Office-Supreme Court, U.S.
FILED
JUL 1 1981
ALEXANDER L. STEVAS,
CLERK

80-2216

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1980

JOHN W. JONES,
Petitioner,

VS.

R. L. FAWCETT AND WIFE, MILDRED FAWCETT,
BUNN F. FAWCETT AND WIFE, JANICE FAWCETT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

JAMES E. DAVIS
COUNSEL OF RECORD
711 Pecan Street
Texarkana, Ark. 75502
Telephone (501) 774-2181
WILLIAM K. MAAS, JR.
706 Main Street, Suite A
Martinez, California 94553
Telephone (415) 228-5292
Attorneys for Petitioner

DOWNE-PERNAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED FOR REVIEW

I. Whether the trial chancellor's denial of petitioner's motion for continuance of trial, due to the absence of plaintiff Mary Rogers Wilson, constituted a denial of due process under the 5th and 14th Amendments to the United States Constitution.

II. Whether the trial chancellor's refusal to disqualify himself upon petitioner's motion for bias, prejudice, and the appearance of impropriety, constituted a denial of due process under the 5th and 14th Amendments to the United States Constitution.

III. Whether the trial chancellor's denial of petitioner's motion to file an amended complaint based on 42 U.S.C. 1985(3) and his request to call witnesses in support thereof, constituted a denial of due process under the 5th and 14th Amendments to the United States Constitution.

LIST OF ALL PARTIES

The original plaintiffs in this action were Otbie Jetton and Lula Bowles Talton. Mary Rogers Wilson was a plaintiff in Intervention and thereafter assigned her rights to petitioner John W. Jones. A complete list of the defendants appears in the caption of this case where they are now identified as respondents.

TABLE OF CONTENTS

	Page
Questions presented for review	i
List of all parties	i
The opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement of the case	3
Reasons for granting the writ	8
I	
The trial chancellor's denial of petitioner's motion for continuance of trial, due to the absence of plaintiff Mary Rogers Wilson, constituted a denial of due process under the fifth and fourteenth amendments to the United States Constitution and therefore should have been reversed by the Arkansas court of appeals	8
II	
The trial chancellor's refusal to disqualify himself upon petitioner's motion for bias, prejudice, and the appearance of impropriety, constituted a denial of due process under the fifth and fourteenth amendments to the United States Constitution	11
III	
The trial chancellor's denial of petitioner's motion to file an amended complaint based on 42 U.S.C. 1985 (3) and his denial of a request to call witnesses in support thereof constituted a denial of due process under the fifth and fourteenth amendments to the constitution	15
Conclusion	18

TABLE OF AUTHORITIES CITED

Cases

Page

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780 (1971) 17
Braswell v. Gehl, 263 Ark. 706, 567 S.W.2d 113 (1978) 12
Church of Scientology v. Cooper, 495 F.Supp. 455 (1980) 12
Farley v. Jester, 257 Ark. 686, 560 S.W.2d 200 (1975) 12
Hampton v. Hanrahan, 499 F.Supp. 640 (1980) 12
Marshall v. Jerrico, Inc., 446 U.S. 238, 100 S.Ct. 1610, ... L.Ed.2d .... (1980) 11
Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) 10
In Re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) 11
Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed. 2d 921 (1964) 8
Woods v. Young, 8 U.S. 237, 4 Cranch 237, 2 L.Ed. 607 (1808) 8
Valdes v. Central Altagarcia, 225 U.S. 58, 32 S.Ct. 664, 56 L.Ed. 980 (1912) 8

Constitution

United States Constitution:
Fifth Amendment ..... i, 3, 15
Fourteenth Amendment ..... i, 2, 3, 15

Statutes

28 U.S.C.:
Section 455(a) 12
Section 1257(3) 2
42 U.S.C., Section 1985(3) ..... i, 5, 6, 15

Other Authorities

A.B.A. Code of Judicial Conduct, Canon 3C 11, 12

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1980

JOHN W. JONES,
Petitioner,

VS.

R. L. FAWCETT AND WIFE, MILDRED FAWCETT,
BUNN F. FAWCETT AND WIFE, JANICE FAWCETT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

John W. Jones, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Arkansas Court of Appeals entered in the above-entitled case April 8, 1981.

THE OPINIONS BELOW

The opinion on April 8, 1981, of the Arkansas Court of Appeals whose judgment is herein sought to be reviewed is unreported and is printed in Appendix A hereto, infra, page 1. The Order of the Arkansas Court of Appeals denying Petitioners' Petition for Rehearing is printed in Appendix A hereto, infra Page 42.

The Decree of Judgment of the Little River Chancery Court entered April 23, 1980, is printed in Appendix A hereto, infra, page 17. The Order Denying Petitioner's Motion for Leave to File Amended Complaint of the Little River Chancery Court entered March 27, 1980, is printed in Appendix A hereto, infra, page 40. The Order and Memorandum Opinion Denying Petitioner's Motion to Disqualify the Trial Chancellor of the Little River Chancery Court entered December 20, 1979, is printed in Appendix A hereto, infra, page 31.

JURISDICTION

The Federal Constitutional questions were timely raised by Petitioner in the Trial Court and have been continuously raised on appeal before the Arkansas Appellate Court. (See Appendix A, infra, page 1.)

The judgment of the Arkansas Court of Appeals was entered on April 8, 1981. A timely Petition for Rehearing was denied on May 6, 1981. (See Appendix A, infra, page 42.)

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws. (Emphases added.)

Furthermore, this case involves the Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation. (Emphases added.)

STATEMENT OF THE CASE

This is a suit for an Order Quieting Title to land located in rural Little River County, Arkansas. The action was commenced by a Complaint filed July 24, 1975, in Little River Chancery Court on behalf of Plaintiff Othie Jetton, Lula Bowles Talton, and Mary Rogers Wilson, all elderly black women. The Defendants, R. L. Fawcett and his wife, Mildred Fawcett, and Bunn F. Fawcett and his wife, Janice Fawcett, filed an Answer and counterclaim on or about August 4, 1975. On or about November 19, 1975, the matter was set for a trial date of February 11, 1976.

Two days before the original scheduled trial date, the attorneys representing Plaintiffs, moved to withdraw from the case. The matter was tentatively reset for trial on March 22, 1976. On March 1, 1976, the Motion to Withdraw was granted. On March 22, 1976, Plaintiffs' Complaint was dismissed for failure to prosecute (Plaintiff did not appear) and title was quieted in Bunn F. Fawcett. Thereafter, a Motion to Set Aside the Default Judgment was filed on or about August 18, 1976. The hearing on this Motion to Set Aside Judgment was held on June 29, 1977, and the Motion was granted as to Plaintiff Mary Rogers Wilson and denied as to the remaining Plaintiffs, Otbie Jetton and Lula Bowles Talton. Thereafter, an appeal by Plaintiffs followed and the Trial Court's Decision was affirmed in all respects. See *Jetton v. Fawcett,* 264 Ark. 69 (1978).

On August 26, 1977, pursuant to the Order of the Trial Court, Mary Rogers Wilson filed a Petition in Intervention in the present action. She thereafter assigned her interest in the property to John W. Jones, her nephew. On September 27, 1979, a Motion to Stay Proceedings brought by Plaintiffs was denied and the matter was set for trial December 20, 1979. On November 26, 1979, the first Motion to Disqualify Trial Chancellor was filed, and heard thereafter on December 6, 1979, and was denied on said date. Also on December 6, 1979, an oral Motion for Continuance on behalf of Mary Rogers Wilson was made. On December 10, 1979, Petitioners' present attorney, William K. Maas, Jr., substituted into the case. On December 17, 1979, two written motions were filed and argued: (1) A Motion for Continuance, and (2) A Motion for Disqualification of Trial Chancellor.

The Motion for Continuance was based on two grounds: (1) Mary Rogers Wilson was a party to the action and a material witness, then living in California, and (2) She was an elderly woman in poor health and unable to attend the trial. The Motion was supported by a written declaration from her doctor as to her inability to travel. The Motion was denied by an oral ruling of the Court after her counsel argued that to allow a trial to go on in the absence of a party to the action would be a deprivation of her rights to Due Process of law.

The Motion for Disqualification of Trial Chancellor was based on the grounds that the Trial Chancellor's communications with Plaintiffs' former attorney in this case indicated that he was biased and prejudiced against the Plaintiff. This Motion was denied orally with the Court issuing a Memorandum Opinion of December 20, 1979, and its final Order entered January 3, 1980, denying Petitioner's Motion for Disqualification. The Memorandum Opinion of December 20, 1979, further discloses that the Trial Chancellor had a close personal friendship with the Defendants. (See Appendix A, infra, page 35.)

The matter was tried on December 20 and 21, 1979. On January 7, 1980, Plaintiff filed a Motion for Leave to File an Amended Complaint based on 42 U.S.C. Section 1985(3) to conform to evidence produced at trial and that since the trial, newly discovered evidence had been discovered. The Motion was heard on January 8, 1980, and orally denied without allowing Plaintiff the opportunity to call witnesses in support of this Motion, a procedure which Plaintiffs' counsel strenuously objected to. On March 27, 1980, the

Court entered a formal Order denying Plaintiffs' Motion to File an Amended Complaint. (See Appendix, A, infra, page 40.)

On February 14, 1980, Petitioner filed a Petition for Writ of Prohibition and Mandamus with the Arkansas Supreme Court seeking a temporary and permanent injunction to prevent the Trial Chancellor from rendering a decision and ordering that there be a transfer of all proceedings to the United States District Court, Western District of Arkansas, Texarkana Division, where a companion action had been filed arising out of the same alleged civil rights violations. The Supreme Court of Arkansas denied the Writ on February 22, 1980, and the Trial Chancellor filed his final decision and Decree on April 23, 1980, denying the intervention of Plaintiffs and quieted title on the land in Defendants.

Plaintiffs filed a Notice of Appeal April 16, 1980, arguing for reversal of the Trial Chancellor's Decision upon numerous grounds including: (1) That the Trial Chancellor's denial of the December 17, 1979, Motion for Continuance was a denial of the rights secured to them by the Due Process Clause of the United States Constitution; (2) The Trial Chancellor's refusal to disqualify himself from hearing the trial was a denial of Due Process of Law under the United States Constitution; and (3) the Trial Chancellor's denial for Leave to File an Amended Complaint was a denial of Due Process rights secured to them by the United States Constitution.

The Arkansas Court of Appeals delivered its Opinion April 8, 1981, (CA-80-459, not designated for publication)

affirming the Trial Chancellor below and finding as to the three alleged errors cited above that: (1) The Denial of Plaintiffs' Motion for Continuance was not a denial of Due Process in that Mary Rogers Wilson had reasonable notice and had an opportunity to be heard; (2) The Trial Chancellor's refusal to disqualify himself was not an abuse of discretion; and (3) That there was no abuse of discretion in not allowing the Amended Complaint to be filed since Plaintiffs were attempting to add a new cause of action based on newly discovered evidence not adduced at trial. The Arkansas Appellate Court in their opinion did not address Appellants' Due Process arguments in relation to the disqualification of the Trial Chancellor nor did they address the Due Process arguments raised in the Trial Chancellor's refusal to allow the filing of the Amended Complaint or the calling of witnesses in support thereof. (See Appendix A, infra, page 1.)

On April 24, 1981, Petitioner filed with the Arkansas Appellate Court a Petition for Rehearing which was denied on May 6, 1981. (See Appendix A, infra, page 42.)

REASONS FOR GRANTING THE WRIT

I

THE TRIAL CHANCELLOR'S DENIAL OF PETITIONER'S MOTION FOR CONTINUANCE OF TRIAL, DUE TO THE ABSENCE OF PLAINTIFF MARY ROGERS WILSON, CONSTITUTED A DENIAL OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THEREFORE SHOULD HAVE BEEN REVERSED BY THE ARKANSAS COURT OF APPEALS

It has been a long established principle before this court that the action of a trial court on an application for a continuance will not be reviewed on appeal. *Woods v. Young,* 8 U.S. 237, 4 Cranch 237, 2 L.Ed. 607 (1808).

However, this total prohibition against overturning a lower court's denial of a continuance was modified in *Valdes v. Central Altagarcia,* 225 U.S. 58, 32 S.Ct. 664, 56 L.Ed. 980 (1912) where this court recognized an exception in a case, ". . . of such clear error as to amount to a plain abuse springing from an arbitrary exercise of power." *Valdes v. Central Altagarcia, supra,* 32 S.Ct. 664, 670.

Moreover, this court has adopted a standard of review that analyzes the propriety or impropriety of the grant or denial of a continuance on a case by case basis, to judge whether there is evidence, from the record, of an abuse of discretion, rising to the proportions of a violation of Due Process. *Ungar v. Sarafite,* 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964).

In the hearing on the Motion for Continuance, Petitioners' attorney made an offer of proof that Mary Rogers Wilson was a material witness in the case, and that she was the only witness who could testify to certain fraudulent and forged deeds. Furthermore, the Motion for Continuance was supported by the affidavit of her doctor which stated that she was confined to her bed and unable to travel.

Contrary to what the Arkansas Appellate Court stated in its decision, "It does not appear from the Appellant's abstract that a request was made for permission to take the deposition and file it at a later date with the court, . . ." (See Appendix A, page 5) the record of the hearing on the continuance reveals just the opposite. Petitioners' attorney did request that a continuance be granted, and that the Court order that Mary Rogers Wilson's deposition be taken before February 1, 1980.

The Appellate Court held that, "Her deposition could have been taken at any time during the two year period between her intervention and the setting date, and, as pointed out above, no reason has been shown why her deposition could not have been taken between that date and the trial date." (See Appendix A, page 6) The Appellate Court's reasoning is ill-conceived. Petitioner did assert sufficiently compelling reasons for a continuance in his offer of proof to the Court as to the present physical condition of Mary Rogers Wilson which was more fully set forth in the doctor's declaration. Further proof was offered that her testimony was needed for adjudication of her property rights, and to proceed in her absence was tantamount to a denial of Due Process. The Arkansas Court of

Appeals should have applied the test set forth in *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), where this Court identified three distinct factors which require consideration in determining whether due process rights have been violated:

> First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge, supra,* 424 U.S. 319 at p. 334.

When applied to this case, it is clear that Petitioner fits within the first category in the *Eldridge* formula in that Petitioner Mary Rogers Wilson was then holding a Life Estate interest in the subject property and, therefore, her interest should have been afforded full protection of the Due Process Clause.

Second, one must evaluate the risk of an erroneous deprivation of such an interest through the procedure used. The risk, in the instant case, was that Petitioner's interest of a Life Estate would be denied to her in a judicial proceeding where she was not present or allowed to testify.

Third, when one considers the less burdensome alternatives which were proposed for Petitioner's right to a full hearing, the Trial Chancellor should have granted a continuance or allowed her deposition to be taken and duly considered.

Viewed in the above context, it is clear that the procedures afforded to Petitioner in the Trial Court and affirmed by the Arkansas Court of Appeals fall short of affording Petitioner Due Process of Law.

II

THE TRIAL CHANCELLOR'S REFUSAL TO DISQUALIFY HIMSELF UPON PETITIONER'S MOTION FOR BIAS, PREJUDICE, AND THE APPEARANCE OF IMPROPRIETY, CONSTITUTED A DENIAL OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

This Court has said that the Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 100 S.Ct. 1610, ... L.Ed.2d .... (1980).

A fair trial and a fair tribunal is a basic requirement of Due Process. Fairness of course requires an absence of actual bias in the trial of the case. *In Re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

In fact, these principles of fairness have been embodied in the A.B.A. Code of Judicial Conduct, Canon 3C which sets forth standards under which a judge should disqualify himself:

> A judge should disqualify himself in a proceeding in which *his impartiality might reasonably be questioned* including but not limited to instances where: (a) He has a personal bias or prejudice concerning a party ... (Emphasis added)

Although not binding upon the Arkansas State Courts, there are numerous decisions that recognize that 28 U.S.C. 455(a) and the A.B.A. Code of Judicial Conduct, Canon 3C mandates that a judge shall disqualify himself whenever his impartiality might reasonably be questioned. *Hampton v. Hanrahan,* 499 F.Supp. 640, 645 (1980); *Church of Scientology v. Cooper,* 495 F.Supp. 455, 462 (1980).

On October 12, 1973, the Supreme Court of the State of Arkansas by per curiam order adopted the A.B.A. Code of Judicial Conduct and declared that it constitutes a proper standard of conduct for the judiciary of Arkansas. Subsequent to the adoption of the A.B.A. Code of Judicial Conduct the Arkansas Supreme Court ruled in *Farley v. Jester,* 257 Ark. 686, 560 S.W.2d 200, (1975) that where a Trial Chancellor is found to be a friend of a witness for one of the parties that it is only proper that a Trial Chancellor disqualify himself because, . . . "court proceedings must not only be fair and impartial—they must also *appear* to be fair and impartial." *Farley v. Jester, supra,* at 692. (Emphasis added)

This ruling was echoed in *Braswell v. Gehl,* 263 Ark. 706, 567 S.W.2d 113 (1978). The Arkansas Supreme Court noted that, even without a request, a judge should disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Petitioners submit that the following grounds indicate that the Trial Chancellor's impartiality might reasonably have been questioned in the present case:

1. Before the trial of this matter began, the Trial Chancellor created an appearance of impropriety by circum-

stances surrounding his Denial of a motion for rehearing in the case of *Alma Mae Duckett Hale, et al., v. John W. Jones, et al.,* Little River Chancery Court No. E78-101.

2. The Trial Chancellor knew on May 21, 1979, that Petitioner's former attorney could not be present in court on May 24, 1979, yet he scheduled the Motion for Rehearing on said date and thereafter dismissed the motion for lack of prosecution.

3. The Trial Chancellor told petitioner's former attorney that he had almost held petitioner in contempt during the trial of *Duckett Hale v. Jones.* During the Motion for Disqualification, when this former attorney was questioned by the Trial Chancellor regarding this alleged threat to hold petitioner in contempt, the Trial Chancellor threatened petitioner's former atttorney with an out of court "conference" regarding that assertion despite the fact that Petitioner's former attorney insisted that that was an accurate statement. The Trial Chancellor, during the Motion for Disqualification, continued to badger Petitioner's former attorney until he received an admission that perhaps someone else had told him that the Trial Chancellor had almost held Petitioner in contempt during the trial of *Duckett Hale v. Jones.*

4. The Trial Chancellor, at a previous hearing on a Motion to Disqualify, informed petitioner's attorney that if there were any evidence the Trial Chancellor had said that he almost held Petitioner in contempt on the previous matter then the Trial Chancellor would disqualify himself or would be inclined to do so anyway. When evidence indicating that the statement was made was presented on

December 17, 1979, in a hearing on the Motion to Disqualify, the Trial Chancellor reneged on his promise and refused to disqualify himself.

5. On the morning of trial, appellants' attorney received a Memorandum Opinion denying the Motion for Disqualification which indicated that the Trial Chancellor had a personal friendship with two of the Defendants in the present action, Bunn F. Fawcett and Janice Fawcett. (Appendix A, p. 75)

6. In the same Memorandum Opinion the Trial Chancellor felt it necessary to deliver a veiled threat regarding Petitioner's inquiry into the Trial Chancellor's prior communications with Petitioner's former attorney and indicated that Petitioner's attorney ought not to try to use these proceedings as a forum to build a malpractice suit against Petitioner's former attorney. The Trial Chancellor exhibited bias and prejudice to Petitioner when he continually railed at questioning of the "bona fides" of a white sheriff, Audrey Thrash, and the "bona fides" of a white law firm involved in this case. Nowhere did the Trial Chancellor ever concern himself with the attacks on the credibility of black witnesses in this matter or show any concern for their "bona fides."

7. The Trial Chancellor refused altogether to consider Petitioner's opening trial brief which Petitioner's attorney attempted to serve and file at approximately 4:50 p.m. January 9, 1980, because it was not filed at 9:00 a.m. under extraordinary circumstances which Petitioner explained to the Court.

8. The Trial Chancellor refused Petitioner's request to file an Amended Complaint for civil rights violations and refused Petitioner's request to call witnesses in support thereof who were present in the courtroom.

In summary, there was ample evidence of the Trial Chancellor's bias and prejudice in this matter and ample evidence that the Trial Chancellor's conduct before, during, and after the trial undeniably created an appearance of impropriety amounting to a deprivation of due process.

III

THE TRIAL CHANCELLOR'S DENIAL OF PETITIONER'S MOTION TO FILE AN AMENDED COMPLAINT BASED ON 42 U.S.C. 1985(3) AND HIS DENIAL OF A REQUEST TO CALL WITNESSES IN SUPPORT THEREOF CONSTITUTED A DENIAL OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

The Arkansas Court of Appeals found that it was within the sound discretion of the Trial Court to refuse Petitioners' Amendment to the Complaint after trial. However, the Arkansas Court of Appeals based its ruling on the assumption that "from the face of the record, it does not appear that Appellants were seeking to amend the pleading to conform to proof already adduced, but were seeking to inject new matters of proof and in fact, new parties to the action." This is an incorrect characterization of the record below. In Petitioners' Amended Complaint for Conspiracy to Violate the Civil Rights of Plaintiffs under 42 U.S.C. 1985(3) and in the Declarations of Lula Bowles Talton and Otbie Jetton in support thereof, numer-

ous facts are recited that were presented during trial that would make the filing of this Amended Complaint permissible to conform to proof adduced at trial. The necessary elements under 42 U.S.C. 1958(3) that were proven at trial and recited in Petitioners' Amended Complaint were as follows:

1. Plaintiffs John W. Jones and Mary Rogers Wilson are negroes and residents of the State of California. Plaintiffs Otbie Jetton and Lula Bowles Talton are negroes and are residents of rural Ashdown, Arkansas. Defendants Bunn F. Fawcett and R. L. Fawcett are caucasians and are residents of Little River County, Arkansas.

2. The Defendants conspired for the purpose of depriving, directly or indirectly, Plaintiffs of their rights to equal protection of the laws through the use of force, threats of force, intimidation, and undue influence, prevented Plaintiffs from asserting title to 160 acres of land in rural Ashdown, Arkansas.

Plaintiff Otbie Jetton testified that she tried to assert her ownership over the subject property by fixing up a house on the property and moving in but was told by Defendant Bunn F. Fawcett not to do so. She witnessed certain acts of terrorism perpetrated upon her property and then was told by the Sheriff not to go back upon the subject property. The record also reflects that Plaintiff Lula Bowles Talton signed a document of which she did not know the contents under an implied threat of death by Defendant R. L. Fawcett.

The Arkansas Court of Appeals, who had the complete record before them, overlooked completely the clear evidence on the record which supported the facts and allegations in the Amended Complaint offered by Petitioner.

Therefore, the Trial Chancellor and the Appellate Court were in error when they found that there was not sufficient proof in the record to allow Petitioner the right to file an Amended Complaint alleging Civil Rights violations.

The Trial Chancellor summarily denied Petitioners' Motion to File an Amended Complaint expressly denying Petitioner the opportunity to offer testimony of witnesses who were present in the courtroom. The Trial Chancellor's summary denial of Petitioners' request to call witnesses in support of the Motion to File an Amended Complaint cannot be viewed as anything less than a denial of Due Process in that it was an act that might forever bar the Civil Rights claims of Petitioners without an opportunity to be heard.

Central to the theme of Due Process of Law is that, at a minimum, absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780 (1971). Therefore, Petitioner submits that the Trial Chancellor's summary denial of appellant's attempt to call witnesses, and the Arkansas Court of Appeals' affirmation of this ruling, violated Petitioner's right to due process of law.

CONCLUSION

Wherefore, Petitioner prays that a Writ of Certiorari be granted.

Dated: July 3, 1981

Respectfully submitted,

JAMES E. DAVIS
COUNSEL OF RECORD
WILLIAM K. MAAS, JR.
Attorneys for Petitioner

Appendix

Arkansas Court of Appeals

No. CA80-459

Otbie Jetton, Lula Bowles Talton, Mary Rogers
and John W. Jones
Appellants

vs.

R. L. Fawcett and Wife, Mildred Fawcett and
Bunn F. Fawcett and Wife,
Janice Fawcett
Appellees

Opinion Delivered April 8, 1981

Appeal from Little River Chancery Court

Hon. Don Steel, Chancellor

AFFIRMED

OPINION

James R. Cooper, Judge

This is an appeal from a decision of the Little River Chancery Court quieting title to the lands in question in appellees and dismissing the intervention of appellant John W. Jones, assignee of appellant Mary Rogers.

Suit was originally filed July 24, 1975, on behalf of appellants Jetton, Talton, and Rogers. On March 22, 1976, the complaint was dismissed for failure to prosecute and title was quieted in Bunn F. Fawcett on his counterclaim. A motion to set aside the default judgment was filed Au-

gust 18, 1976, and the motion was granted as to appellant Mary Rogers and denied as to Jetton and Talton. That ruling by the trial court was affirmed by the Arkansas Supreme Court in *Jetton v. Fawcett*, 264 Ark. 69, 568 S.W.2d 42 (1978). A petition was filed August 26, 1977, by Mary Rogers, Edna Jones, next friend of Mary Rogers, and John W. Jones, assignee of Mary Rogers, requesting that they be allowed to intervene in the proceedings, and the Court granted that request on August 26, 1977. On September 5, 1979, appellees petitioned the Court for a default judgment on their counterclaim. On September 27, 1979, the Court denied a motion by appellants for a continuance, and the case was set for trial on December 20, 1979. On November 26, 1979, the first motion to disqualify the trial judge was filed, and a hearing was held on December 6, 1979, following which the Court denied the motion. An oral motion for continuance on behalf of Mary Rogers was made on December 6, 1979. On December 17, 1979, a motion for continuance was filed along with a second motion for disqualification of the trial court. The motion for continuance was denied December 17, 1979, and the motion for disqualification of the trial court was denied December 20, 1979. The case was tried December 20 and 21, of 1979, and both sides closed their cases with the exception of an agreement between counsel and the Court for the taking of a written deposition, that deposition being set for January 3, 1980. Formal orders denying the motion to disqualify the trial court and denying the continuance were filed January 3 and January 4, 1980. On January 7, 1980, appellants filed a motion for leave to file an amended complaint. On January 8, 1980, appellees filed a motion

to strike the amended complaint, and at a hearing on the matter January 8, 1980, leave to file the amended complaint was denied and the motion to strike the amended complaint was granted.

The case involves 160 acres of land in Little River County, Arkansas. In 1938, the record owner, Tobe Nolen, died intestate, survived by his widow, Lou Nolen, and cousins and nephews. Apparently there was testimony to the effect that Roy Bowles was an illegitimate son of Tobe Nolen. Lou Nolen conveyed all of the Tobe Nolen lands to Roy Bowles on December 8, 1938 by warranty deed, that deed being recorded June 16, 1941. Lou Nolen conveyed a one-half interest in the 160 acres to Mary Rogers and Roy Bowles for life, with the remainder interest to Ola B. Bowles a/k/a Otbie Jetton by warranty deed on July 22, 1930. This deed was recorded May 23, 1941. In April of 1947, Ola B. Bowles a/k/a Otbie Jetton deeded the subject property by quitclaim deed to Roy Bowles, and this deed was recorded February 9, 1949. On November 15, 1950, Roy Bowles and Lula Bowles, his wife, deeded the subject property to R. L. Fawcett. On January 8, 1960, R. L. Fawcett and his wife Mildred deeded the subject property to B. F. Fawcett a/k/a Bunn Fawcett, appellee here, and this deed was recorded May 19, 1960.

The appellees claimed title through Roy Bowles by color of title, payment of taxes, and adverse possession by him during the period from 1938 to 1950, and through their own adverse possession under color of title since 1950. Appellants claim title through the second deed from Lou Nolen.

Trial was held on December 20 and 21, 1979, and on January 3, 1980, appellants filed their motion to amend their complaint, alleging violations of the Civil Rights Act of the United States, 42 U.S.C. § 1985. This motion alleged a conspiracy by appellees to deprive the appellants of their civil rights and alleged threats which were designed to prevent appellants from asserting title to the land in question. Appellants' attorney alleged that it was only during the trial on December 20 and 21, that he learned of a possible civil rights violation. He further alleged that on January 4, 1980, he learned of alleged death threats against appellants Rogers and Jetton. The Court sustained a motion to strike the amended complaint and denied the motion for leave to amend.

Appellants filed a petition in the Arkansas Supreme Court to prevent the trial court from proceeding to render judgment and asked for a transfer of all proceedings to federal court. This writ and motion was denied February 22, 1980, and the transfer to federal district court was denied. The decree in the case was filed April 23, 1980, dismissing the intervention of appellants Jetton and Talton and quieting title in appellees on their counterclaim.

Appellants, for their first point for reversal, argue that the denial of the December 17, 1979, motion for a continuance was an abuse of discretion and a denial of rights secured to them by the fourteenth amendment to the United States Constitution of due process of law. The motion for continuance was filed on December 17, 1979, some two and one-half months following the September 27, 1979 date on which the case was set for trial Decem-

ber 20, 1979. The basis for the motion for continuance was the physical condition of Mary Rogers, one of the appellants and the alleged necessity for taking her deposition at a later date. It does not appear from the appellants' abstract that a request was made for permission to take the deposition and file it at a later date with the court, in the same manner as was anticipated for the deposition of Mrs. Edmondson. Further, appellants argue that since one of the present attorneys was only associated in the case for ten days prior to the trial, that this fact coupled with the offer to take the deposition of Mrs. Rogers was enough to show diligence in attempting to preserve the testimony of a material witness. This argument ignores the fact that there were other attorneys involved in the case prior to December 10, 1979. It also ignores the fact that there was ample time for the taking of depositions between the intervention and the September 27, 1979 setting date, and also between that date and the date of trial. The Arkansas Supreme Court in *Parker v. State*, 271 Ark. 84, 607 S.W.2d 378 (1980), quoted from Russell v. State, 262 Ark. 447, 559 S.W.2d 7 (1977) as follows:

> The matter of continuances is addressed to the sound judicial discretion of the trial court, and its action will not be reversed on appeal in the absence of such clear abuse of that discretion as to amount to a denial of justice.

In this case we do not find a clear abuse of discretion which would amount to a denial of justice. The Court properly denied the motion for continuance.

Appellants further argue that the denial of the motion for a continuance was a denial of rights secured to ap-

pellants by the fourteenth amendment to the United States Constitution. The appellants correctly state that reasonable notice and an opportunity to be heard are fundamental to due process under the fourteenth amendment. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). It is obvious that appellant Rogers, being one of the parties to the action, had reasonable notice of the date the matter was set for trial, and certainly had an opportunity to be heard by deposition. Her deposition could have been taken at any time during the two year period between her intervention and the setting date, and, as pointed out above, no reason has been shown why her deposition could not have been taken between that date and the trial date. We cannot say that any rights of appellant were denied by the denial of the motion for continuance, and, as stated, we find no abuse of discretion by the trial court.

For its second point for reversal, appellants argue that the failure of the trial court to disqualify himself was an abuse of discretion and a denial of due process due to the fact that it was alleged that the Chancellor's conduct before, during and after the trial created an appearance of impropriety and indicated bias and prejudice against appellants. It is alleged that the disclosure by the trial court of his friendship with appellees which was made December 20, 1979, should have caused the Court to disqualify himself. The question of whether or not the Court should have disqualified himself based on friendship with one of the parties is a matter which generally is left to the discretion of the Court and our function is to determine whether or not the trial court abused his discretion in fail-

ing to recuse. *Narisi v. Narisi*, 229 Ark. 1059, 320 S.W.2d 757 (1959). We find no abuse of discretion in failing to recuse on this basis.

Appellants also argue that the conduct between Mr. Boyd Tackett and the Court indicated prejudice against appellants. This is based on the allegation that someone had relayed to Mr. Tackett the information that the Court had almost held appellant Jones in contempt during the 1977 proceedings related to a rehearing in the initial case. Mr. Tackett had been retained by Mr. Jones to seek a rehearing following the original judgment in 1977, dismissing the action as to the parties. The Court denied having made any such statement. Mr. Tackett was unsure of the source of the information and said it could have come from the court reporter. Appellants argue that the information which was passed along to Mr. Tackett by either the trial court or court reporter was sufficient to show some sort of bias on the part of the trial court and an appearance of partiality which would require that the Court recuse itself. There is certainly no showing that the trial court actually did make any statement regarding holding Mr. Jones in contempt at a prior trial, and even if such was established, it would not necessarily establish the fact that the Court might somehow be prejudiced against him in a later trial. Appellants have not seen fit to abstract any portion of the record of the earlier case which would enable us to determine whether or not an exchange took place between the Court and Mr. Jones which could lead to the conclusion that there might be some lasting prejudice on the part of the trial court. There is nothing in the record of this case to show any prejudice, either real or

apparent, by the Court against appellant Jones. We find no merit to this argument.

Appellants further argue that the trial court badgered Mr. Tackett as to whether or not the Court or the court reporter had informed Mr. Tackett about the nearness of a contempt citation of Mr. Jones. From a review of the transcript we do not detect any badgering of Mr. Tackett. He was summoned to court in order that he might be questioned on the matter, having had no advance knowledge of why he was going to court. He was asked to recall with accuracy events which had transpired some two years earlier. We do not find evidence that the Court demonstrated impatience or irritation with Mr. Tackett. The Court was being very conscientious in attempting to determine whether or not the Court had earlier made some kind of comment to Mr. Tackett or whether Mr. Tackett was confused in his recollection as to who hold him what. Therefore, since it was not established that the trial court ever made any statement at all with regard to appellant Jones, no prejudice could be shown. The Court properly denied the request for disqualification on this basis.

The appellants also argue that the fact that the trial court called Sheriff Thrash to testify regarding statements he had made to appellant Jetton constitutes some evidence of partiality, bias and prejudice against appellants. To the contrary, allegations were made that Sheriff Thrash was assisting in preventing appellants from maintaining their interest in the subject property, and the Court determined that it was necessary to inquire of the sheriff as to what actions he had taken. We find no abuse of discretion or evi-

dence of bias due to the fact that the Court sought testimony from Sheriff Thrash.

The third and fourth points urged as grounds for reversal are that the Court did not apply the correct standard in determining adverse possession against a co-tenant, and that the notice of adverse possession was insufficient to deprive appellants of their interest.

The Court correctly found that the rights of Otbie B. Jetton and Lula Bowles Talton had been concluded by the Arkansas Supreme Court in *Jetton v. Fawcett,* 264 Ark. 69, 568 S.W.2d 42 (1978), and that the only question before it was the life estate claim of appellant John W. Jones, assignee of Mary Rogers. The claim of Mary Rogers was based on a warranty deed from Lou Nolen conveying to

> . . . my beloved sister, Mary Rogers, and my beloved nephew, Roy Boles, share and share alike, for and during the remainder of their natural lifetimes, and the remainder in fee simple to my beloved niece, Ola B. Boles . . .
>
> . . . all of my ONE-HALF undivided interest in and to: The W ½ of the SE ¼ and the E ½ of the SW ¼ of Section 14, Township 13 South, Range 30 west. . . .

This deed was dated July 22, 1939, and was recorded May 23, 1949. On December 12, 1938, Lou Nolen had conveyed the entire 160 acres by warranty deed to Roy Bowles. This deed was recorded June 16, 1941. Bowles obtained a quitclaim deed from Ola B. Bowles in 1947, and this deed was recorded February 9, 1949. Roy and Lula Bowles conveyed the property by warranty deed to R. L. Fawcett in

1950, and R. L. and Mildred Fawcett conveyed it to B. F. Fawcett in 1960.

The Court found that B. F. Fawcett received a telephone call from a person who identified herself as Mary or Aunt Mary who lived in California. The Court found that she inquired as to why he was stealing her land. This conversation followed one which B. F. Fawcett had with Otbie Jetton (a/k/a Ola B. Bowles). The Court further found that Fawcett cut timber on the land, paid the taxes and built fences, and that he grazed cattle on the land, built a pond, row cropped part of the acreage, and rented part of the land to others.

Since we hold that Mary Rogers was a co-tenant with Roy Bowles and his successors in title, we must determine whether the proof did establish that knowledge of the adverse claim was brought home to her directly or by such acts that notice may be presumed. *Coulson v. Hillmer,* 271 Ark. 890, ... S.W.2d ..... (Ark. App. 1981). Between tenants in common there is a fiduciary relationship as to the joint property. *Hendrix v. Hendrix,* 256 Ark. 289, 506 S.W.2d 848, (1974). The possession of one tenant in common is *prima facie* the possession of all, and for the possession of one tenant in common to be adverse to his co-tenants, knowledge of the adverse claim must be brought home to them directly or by such acts that notice may be presumed. *Coulson,* supra.

In this case the testimony showed that Mary Rogers knew, at least in early 1969, that Fawcett was exercising a degree of control over the land in question, as she accused

him of "stealing" it. Her intervention in this case was filed August 26, 1977, some eight years later.

The Fawcetts went into possession of the land under color of title, and exercised complete control over it for seventeen years preceding the intervention. It was necessary for Fawcett to prove actual acts indicating his claim of ownership in the land, since otherwise the co-tenant would never know he was claiming adversely. *Utley v. Ruff*, 255 Ark. 824, 502 S.W.2d 629 (1973). Rogers' cause of action accrued when she had actual or constructive notice that the land was being claimed by Fawcett. It does not appear that the Court specifically held that Mary Rogers was barred by the Statute of Limitations, since her actual notice in 1969. The Court held that adverse possession had been established by the actions of the Fawcetts since they acquired title through Bowles in 1950 in that their actions over more than 20 years were sufficient to infer knowledge of the hostile claim. The Court could have based its ruling on Rogers' actual notice. In either case, the finding of the Court that Fawcett had proved adverse possession of the 160 acres is not against a preponderance of the evidence nor is it clearly erroneous. Rule 52, Ark. Rules of Civil Procedure.

For its fifth and sixth points for reversal, appellants argue that fraudulent concealment would prevent the running of the Statute of Limitations and that it would not begin to run until discovery of the fraud. Under Ark. Stat. Ann. § 37-101 (Repl.1962) the statute begins running when the cause of action accrues.

Appellants argue that the deed from Lou Nolen to Rogers and Bowles for life with the remainder to Ola B. Bowles was constructive notice to subsequent purchasers under Ark. Stat. Ann. § 16-114 (Repl. 1979). While it may be true that R. L. Fawcett is deemed to have had constructive notice of the co-tenancy interest of Mary Rogers, this would not prevent his holding adversely to her. Any co-tenancy which was established by deed would have this same constructive notice to later purchasers. Yet, notice of the interest of another, whether actual or constructive, cannot prevent adverse possession, since one of its elements is an intent to hold adversely to the true owner. Roy Bowles clearly knew of the second deed conveying the life estates and remainder interest, else why would he acquire a quitclaim deed from Ola B. Bowles (a/k/a Otbie Jetton). The sale by Bowles to R. L. Fawcett and the later sale by R. L. Fawcett to Bunn F. Fawcett may have been with constructive notice of Mary Rogers' interest, but the sales do not show fraud. There is simply nothing in the record to indicate a concealment of fraud, nor is there any evidence of fraud. The appellants' argument would require a presumption of fraud in every adverse possession case against a co-tenant whose claim was established by deed. We find these arguments to be without merit.

For its seventh point for reversal, appellants argue that the refusal of the trial court to allow the filing of an amended complaint was an abuse of discretion and a denial of due process. Rule 15 of the Arkansas Rules of Civil Procedure provides in part:

> (a) *Amendments.* A party may amend his pleadings at any time without leave of the court. Where, how-

ever, upon motion of an opposing party, the court determines that prejudice would result or the disposition of the cause unduly delayed because of the filing of an amendment, the court may strike such amended pleading or grant a continuance of the proceedings. . . .

(b) *Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties; they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended in its discretion. The court may grant a continuance to enable the objecting party to meet such evidence.

Appellants argue the trial court was in error in interpreting Rule 15 (c) in that the Court ruled that an amended complaint could not be filed following the time both sides had rested their case. Although the rule allows the amendment of pleadings to conform to the proof, the purpose of the rule is not to allow the insertion of new claims for relief following trial of a cause of action. The purpose is to conform the pleadings to the proof which was adduced at trial. The substance of appellants' amended complaint was that death threats had been made which were designed, as part of a conspiracy, to prevent their assertion of rights to the subject land, and that appellees were responsible for the conspiracy. There is no allegation

in the affidavits filed along with the motion for leave of Court to file the amended complaint indicating that such matters were testified to at trial. In fact, appellants' motion alleges that the death threats did not come to counsel's attention until January 4, 1980, some two weeks following trial. Therefore, from the face of the record it does not appear that appellants were seeking to amend the pleadings to conform to proof already adduced, but were seeking to inject new matters of proof, and in fact, new parties to the action (Jetton and Talton). It is within the sound discretion of the trial court to allow or refuse amendments to pleadings. *Folk Construction Company v. Sun Pipe Line Company,* 271 Ark. 836 S.W.2d (Ark. App. 1981). We find no abuse of discretion here. Having so found it is not necessary to consider the argument that the Court was in error when it ruled that civil rights claims could not be raised in the Chancery Court, or that it was an abuse of discretion and a denial of due process to deny appellants the right to call witnesses in support of their motion for leave to file the amended complaint.

For its eighth point for reversal appellants argue that the exclusion of certain testimony by Lula Bowles Talton on the grounds of relevancy and hearsay was an abuse of discretion.

Lula Bowles Talton testified (over objection which was later sustained and the testimony striken), that Roy Bowles indicated to her that he had paid Mr. Fawcett off and that he (Fawcett) was going to build him a brick house on the land. These statements by Roy Bowles were allegedly made the day he was killed in a car accident. The Court excluded the evidence on ground of hearsay and relevancy.

The Court did consider the following testimony of Lula Bowles Talton on cross examination:

> Q. . . . Now, isn't it a fact, Mrs. Bowles, that Roy right after this, he went to work for Mr. Fawcett?
>
> A. He did, but he told me he was paying out his home.
>
> Q. Paying out his home is what he told you?
>
> A. He said, "I don't lack but a little on my debt, and I'm going to work down there and pay it out."
>
> T.398.

The pertinent portion of the excluded testimony is as follows:

> Q. Did he say anything about paying off somebody?
>
> A. He said he done paid Mr. Bunn out and Mr. Louis, he had done turned him a-loose a long time ago, and he was going to build him a brick home right down in front of that, pull sand down in there. T.672.

The excluded testimony, if admitted and believed would go to the color of title held by the Fawcetts. The issue in this case is whether Mary Rogers and her assignee have any interest in the land. The rights of Mrs. Talton and Mrs. Jetton, as previously noted, were foreclosed in the earlier case decided by the Arkansas Supreme Court. We fail to see how this testimony has any relevance in determining whether Bunn Fawcett had acquired title to the lands by adverse possession. Color of title is not an essential element to a claim of adverse possession if there is actual possession. *O'Neal v. Ellison,* 266 Ark. 702, 587 S.W.2d 580 (1979). The trial court correctly excluded the testimony on the grounds of relevance, and since we so hold, we need not consider the question of hearsay.

For its ninth point for reversal, appellants argue that the refusal of the trial court to give any credence to appellants' first brief constitutes an abuse of discretion. The parties waived closing arguments subject to filing closing arguments in the form of written briefs.

Appellants' original brief was due Monday, January 7, 1980. The motion for leave to file an amended complaint was filed that date and the matter was set for hearing at 10:00 a.m. on January 8, 1980. Following that hearing, appellants were given until 9:00 a.m. on January 9, 1980, to file their original brief. The brief was filed after 5:00 p.m. on January 9, 1980, or on Thursday morning January 10. The Court had earlier indicated that it would not consider briefs which were not filed according to the schedule outlined by the Court. (Appellees' brief was due January 22, 1980, and appellants' reply brief was due February 3, 1980.). Since appellants failed to comply with the original briefing schedule, and failed to comply with the extension allowed by the trial court, we find no abuse of discretion by the Court in failing to consider the first brief filed by appellants. As a practical matter, it is very unlikely that any prejudice resulted, since appellants were allowed to file a reply brief in accordance with the original schedule and were able to reply point by point to matters raised by appellees and, we are sure, to include their closing argument in that brief. No prejudice being shown, we do not find that the Chancellor abused his discretion in failing to consider the original brief by appellants.

AFFIRMED.

In the Chancery Court of Little River County, Arkansas

Mary Rogers, Edna Jones, Next Friend of Mary Rogers, and John W. Jones, Assignee of Mary Rogers, Plaintiffs

vs. No. E 75-82

R. L. Fawcett, and Wife, Mildred Fawcett, and Bunn F. Fawcett and Wife, Jancie Fawcett, Defendants

[Filed April 23, 1980]

DECREE

This cause was heard upon the merits by the Court, as scheduled, upon December 20, and December 21, 1979, at which time both parties rested and the evidence was closed, in all respects, except the Plaintiff was granted authority to take the deposition of Martha Edmonson, witness for the Plaintiff, on January 3, 1980, which was then done on that date, and the same was filed on January 7, 1980, and made a part of the record of this case.

Appearing at the trial of this cause on behalf of the Plaintiffs was William K. Maas, and Gunter, Mayes, and Lamb, by Stephen P. Lamb, attorneys, and appearing as attorneys on behalf of the Defendants, were Finley and Finley, and Eric Bishop, and Dennis L. Shackleford.

And all parties announcing ready for trial on said dates, and thereupon completion of the oral testimony of the witnesses, and the introduction of the various written instruments, and exhibits, the court, after being well and sufficiently advised in the premises, makes the following

findings of fact, and conclusions of law as reflected in a Memorandum Opinion of this court dated March 7, 1980:

All claims of Otbie B. Jetton and Lula Bowles Talton (Talon) have been concluded by reason of the decision in Jetton et al vs. Fawcett et al, 264 Ark. 69, 568 SW2d 42 (1978). The only issues now before this court regards the life estate claim of John W. Jones assignee of Mary Rogers a/k/a Mary Rogers Wilson in the W½ of SE¼ and the E½ of SW¼ Section 14, Township 13 South, Range 30 West containing 160 acres, more or less and the counter-claim of the defendant and counter-claimant Bunn F. Fawcett a/k/a B.F. Fawcett wherein he seeks to quiet title in the above described land in himself. The only remaining plaintiff, John W. Jones assignee of Mary Rogers a/k/a Mary Rogers Wilson asserts her claim by reason of an instrument dated July 22, 1939, and filed for record on May 22, 1941, (P. Ex. 11) wherein Lou Nolen, widow of Tobe Nolen, by deed conveyed a life estate in the hereinabove described lands to Mary Rogers and Roy Bowles share and share alike for and during the remainder of their natural lifetimes and the remainder in fee simple to my beloved niece, Ola B. Bowles. After the execution of that instrument Ola B. Jetton (nee Ola Bowles) quitclaimed in April, 1947 and filed for record May 25, 1947, her interest in the above described real estate to Roy Bowles even though Otie B. Jetton at the trial of this case denied having executed said deed. (P. Ex. 14). The next pertinent instrument, in the opinion of this court, is a Warranty Deed with Relinquishment of dower dated November 15, 1950, and filed for record on December 1, 1950, (P. Ex. 17) from Roy Bowles and Lula Bowles to R.L. Fawcett and conveying the

hereinabove described lands. The next decisive instrument, in the view of the court, is a Warranty Deed with Relinquishment of Dower from R.L. Fawcett and Mildred Fawcett, his wife, to B.F. Fawcett, (a/k/a Bunn Fawcett) dated January 8, 1960, and filed for record on May 18, 1960, (P. Ex. 24) conveying the above described lands together with an additional forty (40) acres which has no connection with this litigation.

The above is a resume of the pertinent deeds. The court finds by a preponderance of the evidence and by clear and convincing evidence based upon testimony adduced the following findings of fact. Sometime in the forties Roy Bowles and wife, Lula Bowles, commenced farming the involved 160 acres and there was a house on said acreage that was in a bad state of repair but in which Roy Bowles and his wife and their granddaughter, Augusta or Gusta, lived. In 1950 the Fawcett brothers and their father had a partnership arrangement in farming land and in a store being operated in Ashdown. Roy Bowles had become indebted to the Fawcett partnership by virtue of merchandise purchased at the store in the approximate sum of $1,000.00 and had become indebted to the First National Bank of Ashdown as is evidenced by a Mortgage (P. Ex. 15) and the Fawcetts in consideration of the forgiving of the indebtedness owed by Roy Bowles to the Fawcett partnership store and in further consideration of the promise of J.C. Fawcett and Sons, which was the proper name for the above mentioned partnership, obtained Plaintiff's Exhibit 17 same being the Warranty Deed from Roy Bowles and wife Lula Bowles to R.L. Fawcett to the involved 160 acres. At this juncture it should be pointed out that Lula Bowles

now Lula Bowles Talon testified at the trial of this case that R.L. Fawcett and attorney John C. Finley, Jr., used undue coercion in order to obtain her signature on the Warranty Deed (P. Ex. 17) but there is no evidence in the record that prior to the trial of this matter Lula Bowles a/k/a Lula Bowles Talon had ever before complained of this undue influence and coercion. Even though Plaintiff's Exhibit 17 reflects the grantee as R.L. Fawcett the evidence is most clear and convincing that J.C. Fawcett and Sons, the partnership, was the grantee in interest and this partnership was composed of the father, J.C. Fawcett, and the three sons, R. L. Fawcett, B. F. Fawcett a/k/a Bunn Fawcett and Joe Ed Fawcett. It should be pointed out that a further consideration for the execution of Plaintiff's Exhibit 17 was the assurance of R. L. Fawcett and for that matter the entire partnership that Roy Bowles and wife Lula Bowles a/k/a Lula Bowles Talon could continue to live in the home and in that regard the house was almost uninhabitable in 1950 and the Fawcetts built a modest new home for Roy Bowles and his wife and as stated above they could utilize that house for the rest of their lives if they so desired. The evidence is clear that the main chore of B. F. Fawcett a/k/a Bunn Fawcett in the partnership arrangement was to largely see after the farm land and it is obvious that he had little to do with the operation of the store. Almost immediately after the execution of Plaintiff's Exhibit 17 the Fawcetts and mainly B. F. Fawcett a/k/a Bunn Fawcett commenced exercising control over and dominion over the involved land as is evidenced by the fact that Bunn Fawcett caused to be employed or already had on the payroll twelve hands who

commenced removing sprouts from the land for the reason that Roy Bowles had almost permitted the land to become unusable. B. F. Fawcett a/k/a Bunn Fawcett caused to have constructed a new fence encompassing the full acreage as the old fence was in a bad state of repair. B. F. Fawcett a/k/a Bunn Fawcett almost immediately after the execution of Plaintiff's Exhibit 17 started grazing cattle over a portion of the involved realty. B. F. Fawcett a/k/a Bunn Fawcett contracted with A.S.C.S. for the construction of a pond on the involved premises in order that the livestock would have a water supply. He pastured or row cropped the involved realty every year for the partnership. He rented a portion of the involved real estate in the middle fifties for three or four years to Earnest Davis is order that Earnest Davis could utilize a portion of said real estate to grow cotton and sweet potatoes. Mr. J.B. Shipman made it clear that Bunn Fawcett a/k/a B.F. Fawcett was in control of said land in 1954 by reason of Mr. Shipman having moved cattle for Bunn Fawcett a/k/a B. F. Fawcett from 1954 until 1960 and Mr. Shipman was a cowboy on the place and was paid by Bunn Fawcett a/k/a B.F. Fawcett and took orders from Bunn Fawcett a/k/a B.F. Fawcett. Bunn Fawcett a/k/a B.F. Fawcett leased a portion of the involved 160 acres in the fifties to R.C. Brooks. There has been testimony adduced by the Plaintiff that actually Roy Bowles deeded this place over to R. L. Fawcett with the understanding that he could reacquire the involved land by the payment of the indebtedness owed the J. C. Fawcett and Sons Store and the repayment to the Fawcetts of the money they had expended to satisfy the mortgage that Roy Bowles and wife had

executed in favor of First National Bank of Ashdown (P. Ex. 15), however, witnesses Charlie McCollum and Audrey Thrash stated that Roy Bowles told them on separate occasions in the early 1950's that he no longer owned the place and that he had sold it to the Fawcetts and certainly this court is justified into taking into consideration the interest that the witnesses might have in the outcome of the case and the witnesses McCollum and Thrash could in no way be classified as anything but disinterested witnesses. The testimony is clear and convincing that on or about Jauuary 8, 1960, J.C. Fawcett and Sons partnership dissolved and it is the courts recollection that this was occasioned by reason of the death of J.C. Fawcett and that since B. F. Fawcett a/k/a Bunn Fawcett had more desire for land than other material assets, R. L. Fawcett and wife conveyed the involved real estate to B. F. Fawcett (P. Ex. 24). It is apparent from the above that even during the years that R. L. Fawcett had title to the land that B.F. Fawcett a/k/a Bunn Fawcett actually exercised control over same for the benefit of the partnership and he continued to exercise control when he was the grantee by virtue of the Warranty Deed with Relinquishment of Dower from R. L. Fawcett and Mildred Fawcett (P. Ex. 24). Bunn Fawcett a/k/a B.F. Fawcett continued to do the same thing in the sixties that he had done in the fifties in exercising dominion and control over the involved acreage and it should be noted that after Roy Bowles retired from working at the Fawcett Store that from 1963 to 1968 B.F. Fawcett a/k/a Bunn Fawcett employed Roy Bowles as a farm laborer and paid him wages as is evidenced by Defendant's Exhibit 1. In 1954 some lawyer from Texarkana,

according to R. L. Fawcett a/k/a Louis Fawcett, contacted him questioning him regarding the Nolen tract and he advised the attorney that the Fawcett partnership owned the land. Except for that one instance there was no inkling that anyone claimed an interest adverse to the Fawcetts until after the death of Roy Bowle in the fall of 1968 and shortly after the death of Roy Bowles and either in October or November of 1968, B.F. Fawcett a/k/a Bunn Fawcett noticed a truck at the house on the involved acreage where Roy Bowles and Lula Bowles had lived up until the death of Roy Bowles. The testimony reflects that Lula Bowles a/k/a Lula Bowles Talon left the involved house almost immediately after the death of Roy Bowles. As stated above, B.F. Fawcett a/k/a Bunn Fawcett noticed a truck that he determined belonged to Shorty Jetton near the house and B.F. Fawcett a/k/a Bunn Fawcett asked one of his employees what the truck was doing up there and was advised that Shorty Jetton was going to farm the land. The testimony does not make it clear as to the relationship, if any, between Shorty Jetton and Otbie B. Jetton, but in any event the same day that B.F. Fawcett a/k/a Bunn Fawcett became aware of the plans of Shorty Jetton that he went to the hospital at Ashdown where he knew Otbie B. Jetton was employed to seek out Otbie B. Jetton and ask what the truck was doing up there and Otbie B. Jetton said that the land was her fathers, Roy Bowles, and that she was going to live in the house whereupon B.F. Fawcett a/k/a Bunn Fawcett made it clear to her that he had purchased the land from Roy Bowles and she should seek his permission before attempting to live in the house even though it was quite obvious that he would

have no objection to her living in the house. In January, February or March 1969 B.F. Fawcett a/k/a Bunn Fawcett received a telephone call from a lady who identified herself as Mary or Aunt Mary who lived in California and she asked B.F. Fawcett a/k/a Bunn Fawcett what he was doing stealing her land and in essence B.F. Fawcett a/k/a Bunn Fawcett advised her that he had not stolen any land and for her not to bother him again and if she had any action to take to take it in court and in that regard he had given the same advice to Otbie B. Jetton at the hospital conversation. At all times in 1968 and after 1968 B.F. Fawcett a/k/a Bunn Fawcett continued to exercise control and dominion over the land since it was acquired by R. L. Fawcett in 1950. He caused timber to be cut on the land in rather large amounts and for that matter a sawmill was even moved on the land for a period of time. He continued to lease the land as is reflected by the numerous exhibits and from 1950 until now with the exception of the taxable year 1970, he or his predecessors in title, R.L. Fawcett, have paid the taxes on the land.

In April, 1971, former Sheriff Audrey Thrash testified that Otbie B. Jetton and Mary Rogers paid the taxes but Sheriff Thrash as tax collector didn't think that significant because anyone could pay taxes on anyones land and it didn't bother him. Bunn Fawcett a/k/a B.F. Fawcett testified that he never paid the taxes before they were due in October and he realized in late September, 1971 that Otbie B. Jetton and Mary Rogers had paid taxes for the year 1970. As further evidence of the dominion and control exercised by B.F. Fawcett a/k/a Bunn Fawcett on the 160 acres, he prevailed upon Sheriff Thrash in 1968 to order

Otbie B. Jetton off the land and if she had any claim to go to court. The plaintiff adduced as witnesses Jim Talon, Jim Dunn, Mr. Perry, Ben Harris, Clayburn Talon and Mrs. Parker who were all elderly persons who in essence testified that they knew the place as the Nolen tract and that they knew that Roy Bowles and his wife had lived on the involved real estate until Roy's death but none of them knew anything about the actual ownership of the realty. Plaintiff's witness, J.C. Crownover, a private consulting forester, testified that in his best estimate of the total amount of timber that had been cut from the tract was of a value of $18,407.00. John W. Jones testified that Mary Rogers a/k/a Mary Rogers Wilson was now a resident of California where John W. Jones lives and that he had secured the assignment, same being Plaintiff's Exhibit 3, for the consideration mentioned in the assignment and that he had also been out many thousands of dollars for the care and maintenance of Mary Rogers Wilson a/k/a Mary Rogers.

CONTENTIONS OF PARTIES

Plaintiff John W. Jones as assignee of Mary Rogers a/k/a Mary Rogers Wilson contends that his assignor should be vested with a life estate in the involved 160 acre tract and that plaintiff should recover from the defendants the rents and profits to which defendants have converted to their own use and which should belong to Mary Rogers a/k/a Mary Rogers Wilson and since John W. Jones is assignee of Mary Rogers a/k/a Mary Rogers Wilson that he should have the entitlements of his assignor. Defendants contend that they and specifically B.F. Fawcett a/k/a

Bunn Fawcett has acquired title to the involved 160 acre tract by adverse possession or in the alternative that plaintiff is now barred from asserting any interest in the involved realty by reason of the seven year Statute of Limitations in that it was more than Seven years after her actual knowledge of the claim of ownership by B.F. Fawcett a/k/a Bunn Fawcett before she through her assignee, John W. Jones, commenced an action in an effort to establish her claim. Defendant Bunn Fawcett a/k/a B.F. Fawcett by way of counter-claim asserts that title should be quieted in him to the 160 acre tract by reason of adverse possession.

FINDINGS

The Supreme Court in the case of Smart v. Murphy, 200 Ark. 406, 139 S.W.2d quoted the following statement of the law from 1 American Jurisprudence p. 793 "adverse possession is one of the modes of acquiring title to property. It has been defined as the open and notorious possession and occupation of real property under an evident claim or color of right. It is said to be a possession in opposition to the true title and real owner—a possession which is commenced in wrong and maintained in right. Again, it has been defined as the ripening of adverse possession into title by lapse of time. A title acquired by adverse possession is a title in fee simple, and is as perfect a title as one by deed from the original owner or by patent or grant from the government."

Plaintiff's exhibit number 17, the deed from Roy Bowles and Lula Bowles to R. L. Fawcett conveying the W½ of SE¼ of Section 14, Township 13 South, Range 30 West, and E½ SW¼ of Section 14, Township 13 South,

Range 30 West, without doubt, established color of title to the involved 160 acre tract in R. L. Fawcett. The court finds that upon the execution of Plaintiff's Exhibit 17 or at least shortly thereafter the Fawcetts raised their flag and the Fawcetts have kept their flag up continuously since that time as regards ownership of the involved 160 acre tract.

> The Supreme Court stated in Lollar v. Appleby 213 Ark. 424, 210 S.W.2d 900 "in cases of adverse possession under color of title the actual possession, by presumption of law, is constructively extended to the limits defined in the paper conveyance which gives color of title. In the case, however, of adverse possession without color of title, the adverse possession is limited to the land actually adversely occupied . . .
>
> "While, in such cases, to constitute an adverse possession, there need not be a fence or building, yet there must be such visible and notorious acts of ownership exercised over the premises continuously, for the time limited by the statute, that the owner of the paper title would have knowledge of the fact, or that his knowledge may be presumed as a fact. In other words, it has been well said that if the claimant "raises his flag and keeps it up," continuously for the statutory period of time, knowledge of his hostile claim of title may be inferred as a matter of fact."

As stated above the Fawcetts went into possession of the involved acreage under color of title (P. Ex. 17). B. F. Fawcett a/k/a Bunn Fawcett acquired color of title in himself on January 8, 1960 (P. Ex. 24).

> "The oft-repeated statement that adverse possession is a possession commenced in wrong but maintained in right, does not mean that the possessor must com-

mence his possession with an intentional wrong for the doctrine of adverse possession is intended to protect one who honestly enters into possession of land in the belief that the land is his own." Barclay v. Tussey 259 Ark. 238, 532 S.W. 2d 193.

Under plaintiff's Exhibit 6, it can be argued with merit that Mary Rogers a/k/a Mary Rogers Wilson did hold a life estate with Roy Bowles in the involved tract of land and that when Roy Bowles conveyed to R. L. Fawcett that Mary Rogers a/k/a Mary Rogers Wilson and R. L. Fawcett and later Bunn Fawcett a/k/a B. F. Fawcett were cotenants. These cotenants, however, were strangers rather than cotenants where a family relationship exists. In Minton and Simpson v. McGowan et ux 256 Ark. 726, 510 S.W. 2d 272 where a family relationship existed between cotenants which is not the case in the case at bar the court stated:

> "When such possession is actual, open, notorious, hostile, exclusive and accompanied with an intent to hold adversely against the true owner for the statutory period of seven years, then such adverse possession ripens into good title."

It would, however, appear that upon a close reading of Minton and Simpson v. McGowan, supra, and Cooper v. Cooper 251 Ark. 1,007, 476 S.W. 2d 233 that where a family relationship exists between the cotenants that actual knowledge must be brought home to one cotenant of the intention of the other cotenant to hold adversely. Even applying that standard to the case at bar it is obvious from the testimony of Bunn Fawcett a/k/a B.F. Fawcett that Mary Rogers a/k/a Mary Rogers Wilson certainly

knew of his adverse holding in January, February or March 1969 when she called him by long distance telephone accusing him of stealing her land. Thereafter Bunn Fawcett a/k/a B. F. Fawcett continued to hold the involved land adversely to the interest of Mary Rogers a/k/a Mary Rogers Wilson for a period of more than seven years before the assignee of Mary Rogers a/k/a Mary Rogers Wilson instituted this intervention. Mary Rogers a/k/a Mary Rogers Wilson and Bunn Fawcett a/k/a B. F. Fawcett were complete strangers but applying the close family relationship of cotenants the plaintiff's intervention is without merit in the case at bar. It should also be noted that it is an unknown fact as to how long Mary Rogers a/k/a Mary Rogers Wilson might have known that Bunn Fawcett a/k/a B. F. Fawcett was stealing her land prior to the above mentioned telephone call.

In conclusion defendants Fawcetts and counter-claimant Bunn Fawcett a/k/a B. F. Fawcett have proved to the satisfaction of this court not only by a preponderance of the evidence but by clear and convincing evidence that R.L. Fawcett on behalf of the J.C. Fawcett and Sons partnership went into possession of the involved realty under good and sufficient color of title in 1950 and that since that time the J. C. Fawcett and Sons partnership and the successor in title, Bunn Fawcett a/k/a B. F. Fawcett have held said land openly, visibly, notoriously, continuously, exclusively and adversely, exercising continuous control and dominion over same, paying taxes on same with the exception of one year and holding out to the world that said land was Fawcett land accompanied with an intent to hold adversely and in derogation of the rights of anyone whoever it might be

that claimed an interest in said realty and that B. F. Fawcett a/k/a Bunn Fawcett has acquired title to the subject land by adverse possession.

IT IS THEREFORE ORDERED AND DECREED THAT:

Based upon the above, the intervention of John W. Jones assignee of Mary Rogers a/k/a Mary Rogers Wilson is dismissed for want of equity and the court further finds that based upon the counter-claim of Bunn Fawcett, a/k/a B.F. Fawcett, title to the following described real estate is quieted in Bunn Fawcett; W½ of SE¼ and the E½ of SW¼ Section 14, Township 13 South, Range 30 West, containing 160 acres, in Little River County, Arkansas. All court costs incurred in this action are hereby assessed against the Plaintiff.

Signed this 22nd day of April, 1980.

/s/ DON STEEL

DON STEEL
Chancellor

APPROVED AS TO FORM ONLY:

/s/ WILLIAM K. MAAS, JR.

William K. Maas
An Attorney for Plaintiff

/s/ JOHN C. FINLEY, JR.

John C. Finley, Jr.
An Attorney for Defendants

In the Chancery Court of
Little River County, Arkansas

No. E-75-82

Otbie Jetton, Lula Bowles Talon, Mary Rogers, and John W. Jones,

Plaintiffs,

vs.

R. L. Fawcett and wife, Mildred Fawcett, and Bunn F. Fawcett and wife, Janice Fawcett,

Defendants.

[Filed Dec. 20, 1979]

MEMORANDUM OPINION

On December 17, 1979, the plaintiffs filed their Second Motion for Disqualification of Trial Chancellor, the first Motion having been heard on December 6, 1979, and denied by the court.

In said Motion filed on December 17, 1979, the plaintiffs allege that "(1) The trial Chancellor initiated and/or took part in ex parte communications with counsel for plaintiffs and defendants in violation of standards of the ABA Code of Judicial Conduct." It is no doubt obvious from the undersigned letter dated May 21, 1979, to Mr. Boyd Tackett that the undersigned visited with John Finley, Jr. on a Friday afternoon and Mr. Finley advised the undersigned that he had received a notice from the undersigned that a hearing would be held on a Motion for New Trial in the above captioned case on May 24, 1979. This court is unable to

comprehend that visiting with an attorney involved in litigation in any way violates any Canon of the Code of Judicial Conduct. The fact that John Finley, Jr. in a visit with the undersigned judge advised that he had received a Notice of Hearing from the Clerk surely by no stretch of the imagination could be a violation of any Canon of the Code of Judicial Conduct. The undersigned judge has during his short tenure visited in the office of every practicing attorney within the jurisdiction of the undersigned judge and the undersigned judge will continue during his tenure to visit in the office of attorneys in the district wherein he was elected to be Circuit-Chancery Judge unless advised by a higher court that such visitation is improper. To suggest that such conduct is violative of Canon 3 Section A (4) of the ABA Code of Judicial Conduct is not construing said Canon as this court would construe same. This court construes Canon 3 Section A (4) of the ABA Code of Judicial Conduct as reflected that there should be no ex parte communication by a judge with a lawyer interested in a proceeding concerning the merits of a case in which said lawyer was connected. If the mere mention of a case by a judge or by an attorney with a judge in a case in which the attorney is involved is violative of Canon 3 Section A (4) of the ABA Code of Judicial Conduct then the undersigned judge in no way understands the Code of Judicial Conduct. The undersigned judge at no time during his short tenure as Circuit-Chancery Judge in his visitation with attorneys has discussed the merits of a case in which the attorney which the judge was visiting was involved and hopefully no court will ever rule and this court does not rule that visiting in the office of an attorney shows im-

propriety. To the contrary, attorneys are arms of the court and a good relationship between the trial judge and an involved attorney in this courts thinking are indispenible to the administration of justice in America and surely such visitation in no way would undermind public confidence or erode public confidence in the judiciary. This court has no apology to make in visiting in the office of John Finley, Jr. and will continue to make such visitation knowing that in no way will public confidence in the judiciary be eroded by such visits and if in passing the trial judge is made aware that Mr. Finley had received Notice from the Clerk of a hearing on May 24, 1979, is regard to a Motion for New Trial filed by Mr. Tackett certainly this shows no impropriety in this courts opinion.

The proponents of the Motion for Disqualification of Trial Chancellor also contend that ex parte communications were had by this court with attorney Boyd Tackett in the home of the trial judge and by telephone call or calls with the trial judge. Suffice it to say that attorney Boyd Tackett often visits in the home of the trial judge and this trial judge has visited in the home of attorney Boyd Tackett. This trial judge is called by attorney Boyd Tackett on numerous occasions and unquestionably this trial judge has called Boyd Tackett as he has every other attorney in the district. This court denies that at anytime impropriety has existed in those telephone conversations and/or visitations nor has the trial court gone into the merits of the case with attorney Tackett during such visitations or during long distance telephone call conversations. This court reiterates that it cannot believe that the Code of Judicial Conduct could be construed to reflect that such visitations or phone

calls suggest impropriety and so holds that no improprieties exists. If a higher court rules that it is improper for Mr. Tackett to visit in the home of the trial judge then this court with all due respect to such high court would ask such high court the method said court would take to keep Mr. Tackett from coming into the trial court's home.

The main thrust of plaintiffs' Motion evolves upon a letter dated July 24, 1979, from attorney Boyd Tackett to attorney Robert S. Gunter in which Mr. Tackett states "my greatest information was from the trial judge who advised me that he had almost held Mr. Jones in contempt during the trial of the case." It is not necessary for this court to refer to Mr. Tackett's testimony on December 17, 1979. The record is clear in that regard. Suffice it to say that this court knows beyond any reasonable doubt that he never told attorney Boyd Tackett that he almost held Mr. Jones in contempt during the trial of this case and if there was any reasonable doubt in the trial judge's mind, the undersigned would hastily disqualify himself and thereby absolve this court of the responsibility of hearing this case during the holiday season or any other season. As Mr. Maas indicated, Mr. Tackett is confused and even though this court regards Mr. Tackett as one of the finest trial attorneys in the state still the court will adopt Mr. Maas' statement in his closing statement on behalf of plaintiffs' Motion for Disqualification of Trial Chancellor that Mr. Tackett is confused or somewhat confused.

Mr. Maas makes mention in his argument or statement in support of his Motion to Disqualify Trial Chancellor that the plaintiff is a black resident of California and the defen-

dants and counter-claimants are residents of Little River County, Arkansas. There is no question as to the accuracy of that statement by Mr. Maas but such statement in no way reflects that this trial judge is in any way biased or prejudiced concerning a party to this litigation. Although it was not brought out in this record, the undersigned judge would be less than candid if he did not admit that he knew at least two of the defendants and counter-claimants in this cause and that he had a friendly relationship with Bunn F. Fawcett and wife Janice Fawcett and that he does not know any of the plaintiffs in this cause. Surely this is not an unusual situation for a trial judge to face. The undersigned judge was well aware that when he assumed the office which he now holds that many many occasions would arise when said trial judge would have a friendly relationship with one of the party litigants and not even know the other party litigants but this trial judge also knew that in keeping with the best traditions of the American Justice System that such friendships must necessarily be forgotten and set aside when it came to decision making on the property rights of said litigants and even more importantly the rights of liberty of said party litigants.

If this trial judge cannot give a black from California the same fair and impartial trial that he can give to the adverse litigant or litigants (friends from Little River County) then obviously the undersigned trial judge is not worthy of holding the responsible position that the electorate of the Ninth Judicial Court West has bestowed upon him. By the same token the friendly litigants of the trial judge from Little River County, Arkansas, also have some rights and those rights include a fair and impartial trial from the trial judge. Regardless of the outcome of this

case all party litigants may rest assured that said decision, whatever it may be, will be based upon the testimony and the law and not in any way reflected by the color of the skin of any party litigant or the friendship that might exist between this trial judge and a particular party litigant or litigants. Surely a trial judge cannot disqualify himself simply because he is a friend of a party litigant. To sustain such a contention if such a contention exists not only borders on the ridiculous but is ridiculous for how else could a trial judge be elected to office if he didn't have friends.

The attorneys in support of their Motion to Disqualify Trial Chancellor in argument mention very forcefully that this court should not have on May 24, 1979, denied the Motion for Rehearing in the Alma Mae Duckett Hale et al v. John W. Jones et al case number E-78-101 for lack of prosecution. The transcript of the proceeding on September 27, 1979, as it relates to the witness Honorable Boyd Tackett conclusively shows to the satisfaction of this court that Mr. Tackett through his conversation with Mr. Jones that Mr. Jones was not going to be present on May 24, 1979, and, therefore, Mr. Tackett was not going to be present on May 24, 1979, to pursue the Motion for Rehearing. The testimony of Mr. Tackett at the hearing on September 27, 1979, makes this fact abundantly clear but even so this court knows that said court waited until at least 5:30 p.m. on May 24, 1979, for Mr. Tackett or members of his firm to appear relative to the Motion for Rehearing and neither Mr. Tackett or members of his firm appeared to pursue the Motion for Rehearing. It is not in any record that has been introduced into evidence and there may be no recorded evidence of such fact but this court knows

without doubt that certain members of the Tackett firm did appear at a regular day of Chancery Court on May 24, 1979, to-wit: Mr. Gene Harrelson, Mr. J. O. Moore and Mr. Boyd Tackett, Jr., who although is not a member of Boyd Tackett, Sr.'s firm still Boyd Tackett, Jr. is still Boyd Tackett's son and this court is well aware of that and this court specifically recalls that he asked Mr. Harrelson, Mr. Moore and Mr. Tackett, Jr. on May 24, 1979, when they appeared in the Chancery Court of Little River County on other business that they had in said court whether they were prepared to pursue the involved Motion for Rehearing and a negative response was given. It has been suggested by Mr. Maas in his argument that the court should have called Mr. Tackett's office by telephone on May 24, 1979, before dismissing the Motion for Rehearing for lack of prosecution because this court had a duty to carefully protect the rights of a party litigant to-wit: John W. Jones. Although this court does not believe that said court owed a duty to call Mr. Tackett's office to remind him of the hearing still this court is confident that he did in fact call Mr. Tackett's office in the late afternoon of May 24, 1979, and there was no answer regardless of the fact that Mr. Tackett testified that his office was open every day from 8:00 a.m. in the morning until 10:00 p.m. at night. Suffice it to say, that this court has satisfied himself that he gave Mr. Tackett or any members of Mr. Tackett's law firm every opportunity to be heard on the Motion for Rehearing dated May 24, 1979, before dismissing the Motion for lack of prosecution as the docket reflects.

It has been suggested by Mr. Finley that most of the hearing as regards the Motion to Disqualify Trial Chancellor on December 17, 1979, entailed an effort on the part of the proponents of the Motion to build a malpractice suit against Mr. Tackett. This court did not on December 17, 1979, nor does not now regard that this was the purpose of the proponents of said Motion but if there should be merit in what Mr. Finley stated then certainly efforts to utilize this courts time in hearing testimony adduced at the hearing on December 17, 1979, and to use this court as a forum to build a malpractice suit against Boyd Tackett is a deplorable and repulsive condition which this court would not have tolerated for one moment. The undersigned judge does not think this was the purpose of testimony adduced by the proponents of the Motion to Disqualify Trial Chancellor at the hearing on December 17, 1979, and certainly trusts that such was not the case.

It may be said with some merit that this court has not in detail gone over the exhibits upon which plaintiffs base their Motion for Disqualification of Trial Chancellor in detail but such exhibits speak for themselves and a higher court will have full benefit of such exhibits and reasonable inferences therefrom.

This court is denying the Motion of Plaintiffs to Disqualify Trial Chancellor for a second time knowing full well the grave responsibilities which any trial Chancellor has in any case but further knowing full well that this responsibility was brought on the trial Judge or Chancellor by his own initiative in seeking and being elected to the office which he now holds and all parties may be assured

that this trial Chancellor will do his utmost to efficiently discharge the oath of office to which he was administered and at all times comply with the judicial code of conduct and also base his decisions upon the testimony and the law knowing that friendship must be forgotten when administering justice to the best of his ability within the framework of the finest judicial system upon the face of the earth.

Motion for Disqualification of Trial Chancellor denied.

/s/ DON STEEL
Chancellor

In the Chancery Court of
Little River County, Arkansas

No. E 75-82

Otbie Jetton, et al.,
Plaintiffs,

vs.

Bunn F. Fawcett, et al.,
Defendants.

[Filed March 27, 1980]

ORDER

Now on this 8th day of January, 1980, a day of this court, was presented to the court, the Motion to file an Amended Complaint in the above styled cause, said pleadings having been filed on January 7, 1980, in said styled cause Otbie Jetton, Lula Bowles Talton, Mary Rogers Wilson, and John W. Jones, Plaintiffs vs. Bunn F. Fawcett, and Louis (R.L.) Fawcett, Defendants; and captioned, Conspiracy to violate Civil Rights of Plaintiffs under the Civil Rights Act (42 U.S.C. 1985 (3)). That said complaint was signed by William K. Maas, Jr., one of the attorneys for Plaintiffs.

On January 8, 1980, said Defendants by one of their attorneys, John C. Finley, Jr., signing the pleadings, filed a Motion to Strike Amended Complaint.

It is therefore ordered, in this cause, that the Motion for leave to file an Amended Complaint, is hereby denied to the Plaintiffs.

And further, that the Motion by the Defendants, to strike the Amended Complaint, is hereby granted.

/s/ DON STEEL
Chancellor

Signed 3/27/80

[Letterhead]

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Little Rock

May 6, 1981

William K. Maas, Jr.
Attorney at Law
Suite A
Martinez, CA 94553

Robert S. Gunter
Attorney at Law
PO Box 1775
Little Rock, AR 72203

James E. Davis
Attorney at Law
711 Pecan St.
Texarkana, AR 75502

John C. Finley
Attorney at Law
Box 405
Ashdown, AR 71822

RE: Otbie Jetton et al v. Fawcett et al
CA80-459

Gentlemen:

The Arkansas Court of Appeals made the following order today in the above styled case:

Petition for Rehearing is denied.

Sincerely,

/s/ Christy L. Scales,
Deputy Clerk

Office-Supreme Court, U.S.
FILED
JUL 24 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-2216

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

JOHN W. JONES,

Petitioner,

VS.

R. L. FAWCETT AND WIFE, MILDRED FAWCETT, BUNN F. FAWCETT AND WIFE, JANICE FAWCETT,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

JOHN C. FINLEY, JR.
Counsel of Record
JOHN C. FINLEY III

FINLEY & FINLEY
Attorneys at Law
20 E. Main St.
Ashdown, Arkansas 71822
Telephone (501) 898-3147

Attorneys for Respondents

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Trial Chancellor's denial of Petitioner's Motion for Continuance of trial, due to the absence of Plaintiff, Mary Rogers Wilson, constituted a denial of due Process under the Fifth and Fourteenth Amendments to the United States Constitution.

II. Whether the Trial Chancellor's refusal to disqualify himself upon Petitioner's Motion for bias, prejudice, and the appearance of impropriety, constituted a denial of due Process under the Fifth and Fourteenth Amendments to the United States Constitution.

III. Whether the Trial Chancellor's denial of Petitioner's Motion to file an amended Complaint was based on 42 U.S.C. 1985(3) and his request to call witnesses in support thereof, constituted a denial of due Process under the Fifth and Fourteenth Amendments to the United States Constitution.

LIST OF ALL PARTIES

The Original Plaintiffs in this Action, filed on July 25, 1975, were listed as Otbie Jetton, Lula Bowles Talton and Mary Rogers. The above assigned their Rights to Petitioner, John W. Jones, on May 22, 1976. Filed for record June 24, 1976. (R. 411) (P's Exhibit No. 3.)

The Trial Chancellor in a hearing on June 29, 1977 in Little River County, Arkansas Chancery Court, held that Mary Rogers Wilson, had never authorized her signature to the Complaint, and hence did not award a default judgment against her on her alleged one-half lifetime

interest, in 160 acres of land in Little River County, Arkansas.

The Defendants in said action, the Respondents here are: R. L. Fawcett and Mildred Fawcett, his wife; and Bunn F. (B. F.) Fawcett and Janice Fawcett, his wife.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF ALL PARTIES i

THE OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR NOT GRANTING THE WRIT — ARGUMENT 3

I.

The Trial Chancellor's denial of Petitioner's Motion for Continuance of Trial due to the absence of Plaintiff, Mary Rogers Wilson did not constitute a denial of due Process under the Fifth and Fourteenth Amendments to the United States Constitution and therefore was properly decided by the Arkansas Court of Appeals. 3

II.

The Trial Chancellor's refusal to disqualify himself upon Petitioner's Motion for bias, prejudice, and the appearance of impropriety, did not constitute a denial of due Process under the Fifth and Fourteenth Amendments to the United States Constitution. 7

Page

III.

The Trial Chancellor's Denial of Petitioner's Motion to file an Amended Complaint based on 42 U.S.C., 1985(3) and his denial of a Request to call Witnesses in Support thereof did not constitute a denial of due process under the Fifth and Fourteenth Amendments to the Constitution. ... 17

CONCLUSION 24

TABLES OF AUTHORITIES CITED

Cases

Page

Barry v. Sigler, C.A. Neb. 373 F.2d 835 (1967) 12

Bass v. Minich, 194 Ark. 589 (1937) 7

Braswell v. Gehl, 263 Ark. 706, 567 S.W.2d 113 (1978) ... 13

Connell v. Steel Haulers, Inc., 455 F.2d 668 (C.C. A. 8th, 1972) 6

Edmonson v. Farris, 263 Ark. 505, 565 S.W.2d 617 (1978) 13

Farley v. Jester, 257 Ark. 686, 560 S.W.2d 200 (1975) 12

Folk Construction Company v. Sun Pipe Line Company, 271 Ark. 836 (Ark. App. 1981) 19

Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972) 5

Garrett v. State, 187 Miss. 441, 193 So. 452 11

Harley v. Oliver, 400 F. Supp. 105 (1975) 12

Home Fire Insurance Co. v. Benton, 106 Ark. 552, 153 S.W. 830 (1913) 20

Jetton, et al. v. Fawcett, et al., 264 Ark. 69, 568 S.W.2d 42 (1978) 1, 5

Jordan Bierbaum v. City of Hamburg, 262 Ark. 532, 559 S.W.2d 20 (1977) 20

McMorella v. Greer, 211 Ark. 417, 200 S.W.2d 974 (1947) 6

Page

McSurley v. McClellan, 426 F.2d 664 (C.C. A., D.C. 1970) 6

Meyers v. State, 252 Ark. 367, 479 S.W.2d 238 (1972) 9

Narisi v. Narisi, 229 Ark. 1059, 320 S.W.2d 757 (1959) 11

Newhouse Mill Lumber Co. v. Keller, 103 Ark. 538, 146 S.W. 855 (1912) 5

Parker v. State, 271 Ark. 84, 607 S.W.2d 378 (1980) 6

Scott v. Cleveland, 110 Ark. 9 (1913) 4

State v. George, 250 Ark. 968, 470 S.W.2d 93 (1971) 13

United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed. 2d 788 10

Walker v. Bishop, 408 F.2d 1378 7

Watts v. Cohn, 40 Ark. 114 (1882) 6

Constitution

UNITED STATES CONSTITUTION:

Fifth Amendment 2

Fourteenth Amendment 2

Statutes and Rules of Court

Page

Arkansas Statutes Annotated, Vol. 3 A, Sec. 27-1403, page 188 4

Arkansas Statutes Annotated, Vol. 3 A, page 512, Rules 4 and 5 5

Arkansas Statute 1947 Annotated (1979 Repl.), Vol. 3 A, Rules of Civil Procedure, No. 40 a. & b., pages 391-393 6

Arkansas Statute Annotated, Vol. 3A, (1947 Repl.), Rule 14(a) 1 & 2, Civil Procedure Circuit and Chancery Court Rules Appendix Rules of Court, page 516 17

Arkansas Statutes Annotated, Vol. 3 A, Rules of Court, Appendix, Rule 15, a. & b. page 345 19

Arkansas Statutes Annotated, 1947 (1962 Repl.), Sec. 22-404 page 73, Vol. 3 20

Arkansas Statutes Annotated, 1947, Sec. 22-301, page 26, Vol. 3 20

Other Authorities

21 A.L.R., Sections 2, 3 and 4 pp. 1370-1374 9

48 C.J.S., *Judges*, Sec. 82(c), p. 1062 11

48 C.J.S., Sec. 82, subsection C, p. 1061 ..... 9, 11

48 C.J.S., Sec. 82, subsection C, p. 1063 10

48 C.J.S., Sec. 82, subsection b, pp. 1058-1059 10

A.B.A., *Code of Judicial Conduct, Canon* 3 C 13

NO. 80-2216

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

JOHN W. JONES,

Petitioner,

VS.

R. L. FAWCETT AND WIFE, MILDRED FAWCETT, BUNN F. FAWCETT AND WIFE, JANICE FAWCETT,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

R. L. Fawcett and wife, Mildred Fawcett, and Bunn F. Fawcett and wife, Janice Fawcett, Respondents herein, pray that a Writ of Certiorari not be granted to review the judgment of the Arkansas Court of Appeals entered in the above entitled cause on April 8, 1981.

THE OPINIONS BELOW

Petitioners did not list the Opinion of the Arkansas Supreme Court in *Jetton v. Fawcett*, 264 Ark. 69 (1978).

However they have mentioned the same in their Statement of Facts, and it would appear that the case is essential to them, having made Otbie Jetton and Lula Bowles Talton, Plaintiffs, in their Amended Cause of Action, Argued here.

JURISDICTION

Petitioners have alleged that their jurisdictional requisites are adequate.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners have cited the First Section of the Fourteenth Amendment to the Constitution of the United States, and the Fifth Amendment to the Constitution as being involved in this cause. Respondents do not find the same to be so involved.

STATEMENT OF THE CASE

Respondents adopt the statement of facts, of the above cause, as set out in the Opinion, of the Arkansas Court of Appeals, No. CA 80-459, opinion delivered by James R. Cooper, Judge, April 8, 1981. (Petitioner's Petition for a Writ, Appendix, A-1 - A-4 including second paragraph.) This is incorporated by reference, as it sets out the facts of the cause, without argument, in the opinion of Respondents.

ARGUMENT

REASONS FOR NOT GRANTING THE WRIT

I

THE TRIAL CHANCELLOR'S DENIAL OF PETITIONER'S MOTION FOR CONTINUANCE OF TRIAL DUE TO THE ABSENCE OF PLAINTIFF MARY ROGERS WILSON, DID NOT CONSTITUTE A DENIAL OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THEREFORE SHOULD NOT HAVE BEEN REVERSED BY THE ARKANSAS COURT OF APPEALS.

The only question presented here is whether or not the Trial Chancellor abused his discretion by refusing to continue this case. No Constitutional question is presented here. The State Appellate Court properly held there was no abuse of discretion which the Trial Chancellor exercised in this case.

It is interesting to note that in the trial of this cause on its merits, Attorney Maas, for Petitioners, stated before the Trial Court, that Mary Rogers Wilson no longer had any interest in the case, and there wasn't anything that she could testify to. (R. 663-664)

The undisputed record in this case points to the fact, that the intervention on behalf of Petitioners was filed on August 26, 1977, and that Petitioners made no move at all to bring the action to trial, until after Respondents filed their motion for a default judgment, on their counterclaim, on September 5, 1979, Petitioners' Petition for Writ, Appendix, A-2.

At a hearing on this motion on September 27, 1979, the Trial Chancellor set the cause down for trial in Little River County, Arkansas Chancery Court on December 20, 1979.

Petitioners made no move in writing for the continuance of the cause until December 17, 1979, despite the fact, that they knew that Mary Rogers Wilson was and had been an invalid for some time, was over 100 years of age, and in failing health. (R. 407-408)

Yet, they made no move to take the deposition of the witness. From the record, it would seem that, as they stated, "... so far I haven't seen anything that she could testify to."

In the affidavit for continuance by the physician, for Petitioners, there was no statement as to when the witness got sick, or how long she had been sick, or when, if ever, she would be able to travel, or to testify by deposition, or give testimony. *Scott v. Cleveland*, 110 Ark. 9 (1913).

Arkansas Statutes Annotated, Vol. 3 A, Section 27-1403, page 188, cited by Petitioners in their State Appellate Argument (Brief page 85), provides that to postpone a trial on account of the absence of evidence, the affidavit must show the materiality of the evidence expected to be obtained, due diligence to obtain it, what the absent witness will prove, and that the affiant believes it to be true.

There was no affidavit or evidence at all of what Mary Rogers Wilson, would have actually testified to. The only thing offered was a statement before the Court of an attorney for Petitioner that Mary Rogers Wilson was a material witness and would make an offer of proof that the record would reflect what their contention was — that there were certain deeds which were forged and a chain

of title containing some false and fraudulent forged deeds that the only person who could testify confidentially about these, was Mary Rogers Wilson. (R. 196-197)

They did not set out specifically what deeds were forged, when, or dates, or what relation the deeds would have to the outcome of the case. These statements before the court were mere allegations of what they sought to prove, not sworn to, and not specific.

Under Arkansas law, it is well settled that a motion for continuance which states conclusions and not facts, as to what a proposed witness, would testify to, is insufficient. *Newhouse Mill Lumber Co. v. Keller,* 103 Ark. 538, 146 S.W. 855 (1912).

Reasonable notice and an opportunity to be heard, as mentioned in *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972), was not violated by the Trial Chancellor, when referring to a certain portion of the transcript of proceedings of the testimony of the witness Mary Rogers Wilson, in *Jetton, et al. v. Fawcett, et al.,* 264 Ark. 69, 568 S.W.2d 42 (1978), with reference to facts therein, in the Motion for continuance hearing on December 17, 1979. Petitioners did not abstract the testimony or part thereof, of the original record in the State Appellate Court.

The Uniform Rules for Circuit and Chancery Courts, Volume 3 A, Ark. Statutes 1947 Annotated, page 512, Rule 4(a), states: Cases will be set at the request of any party after issues joined and a reasonable time has lapsed. . . . Rule 5, Settlements or Continuances, (b) After a case has been set for any purpose, no continuance will be granted, except for good cause shown.

The Rules of Civil Procedure of Arkansas, Rule 40, Trial Settings and Continuances, Vol. 3, Ark. Statutes, 1947 Annotated (1979 Replacement, pages 391-393), provide (a) Cases shall be set for trial at the request of any party after the issues have been joined. . . . (b) The court may, upon motion and for good cause shown, continue any case previously set for trial. . . . Reporter's notes to Rule 40 ". . . 3. FRCP sets no guidelines for determining when a continuance should be granted. The Federal Courts have taken the position that the matter of granting or refusing to grant a continuance rests in the discretion of the trial court." *McSurely v. McClellan*, 426 F.2d 664 (C.C.A. D.C. 1970); *Connell v. Steel Haulers, Inc.*, 455 F.2d 668 (C.C. A. 8th, 1972).

The matter of continuances is addressed to the sound judicial discretion of the Trial Court, and its action will not be reversed on appeal in the absence of such clear abuse of that discretion as to amount to a denial of justice. *Parker v. State*, 271 Ark. 84, 607 S.W.2d 378 (1980); *McMorella v. Greer*, 211 Ark. 417, 200 S.W.2d —— (1947); *Watts v. Cohn*, 40 Ark. 114 (1882).

When Petitioners neglected after September 27, 1979, until December 17, 1979 to ask for the continuance of the case, or the deposition of the witness, Mary Rogers Wilson — and having previously neglected the same by deposition, from August 26, 1977, until the said September 27, 1979, over two years — how now can the Petitioners complain that they were denied their constitutional rights for the failure of the trial court to continue this case?

II

THE TRIAL CHANCELLOR'S REFUSAL TO DISQUALIFY HIMSELF UPON PETITIONER'S MOTION FOR ALLEGED BIAS, PREJUDICE AND THE APPEARANCE OF IMPROPRIETY, DID NOT CONSTITUTE A DENIAL OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Here again the only question presented is whether or not the Trial Chancellor abused his discretion by refusing to recuse from the proceedings; which action was opposed by the Respondents, as a further delay in the cause by Petitioners, which had not been prosecuted by Petitioners in over two years after the filing thereof.

Certainly the Trial Judge has as much obligation not to recuse himself, when there is no occasion to do so, as there is to recuse himself when such an occasion exists. *Walker v. Bishop*, 408 F.2d 1378.

There is no presumption that a judge is disqualified, the burden being on the party asserting it to present facts showing such disqualification and the evidence must clearly show that a ground exists. *Bass v. Minich*, 194 Ark. 589 (1937).

The allegations of Petitioners were that John W. Jones, was a Defendant in a Little River County Arkansas Chancery Court case, in which Alma Duckett Hale was the Plaintiff, in cause No. E-78-101, and that on February 22, 1979, the Trial Chancellor, in a hearing, cancelled certain deeds in favor of the Plaintiff, against the Defendant.

Thereafter and on September 27, 1979, in a Motion for

a new trial, Petitioners alleged that one of their then attorneys, Mr. Boyd Tackett, made the statement that the Trial Chancellor almost held John W. Jones in contempt of Court, during the trial of the *Hale v. Jones* case, supra, on its merits on the said February 22, 1979.

In the motions for a New Trial filed by Petitioners on December 6, and December 17, 1979, Mr. Boyd Tackett (who was not even an attorney in the case on the trial of the merits but who later filed the first motion for a new trial, on May 1, 1979) stated that it must have been a court reporter, who told him, that the Trial Chancellor almost held John W. Jones in contempt, as the Trial Chancellor never talked with him about the merits of a case in his life. (R. 333-334) Petitioners' Petition for Writ, Appendix A-7.

The Trial Chancellor in his Memorandum Opinion denied that he had ever made any statement to Mr. Boyd Tackett or anyone else, that he almost held John W. Jones in Contempt. Petitioners' Petition for Writ, Appendix A-34.

Petitioners also sought to prove discrimination by the Trial Chancellor in granting a default judgment on the Motion for a New Trial granted against Petitioner, when Mr. Boyd Tackett did not appear to prosecute his Motion for a new trial. Petitioners' Petition for Writ, Appendix A-36.

It is highly significant here that the Trial Chancellor did give a complete new trial to Petitioners on their Motion for a New Trial, and to their new attorneys on September 27, 1979, and the Trial Chancellor commented in the evidence of the hearing, that if there was any misunderstanding on the previous hearing, then he was going to rectify

that. (R. 312) The result of this hearing was again to deny a new trial in the *Hale-Jones* case, supra, to Petitioners.

It is important to note here also that Petitioners did not appeal the *Hale-Jones* case, Little River Chancery No. E-78-101. Neither did they enter into the record of the case any happenings, remarks or evidence of any nature, that the Trial Chancellor was harsh, inconsiderate, biased or prejudiced against Petitioner. Don't you know that if there had been any evidence of unfairness to John W. Jones, in the trial of that case, that Petitioner would have had such evidence before the Appellate Court on review?

Even the Petitioners have not charged that the Trial Chancellor was disqualified from hearing the Jones v. Fawcett, CA 80-459, case, because of having previously heard *Hale v. Jones*, supra, and bias or prejudice must be found. 21 A.L.R., Sections 2, 3 and 4 pages 1370-1374.

A previous ruling of a judge although erroneous does not disqualify him. 48 C.J.S., Sec. 82, Subsection C, page 1061.

In Arkansas even in a criminal case, the judge was held not to be disqualified where a defendant sought post-conviction relief, after the judge had previously sentenced him in a case, and the defendant sought assignment of the case to another judge. It was held in *Meyers v. State*, 252 Ark. 367, 479 S.W.2d 238 (1972) that he was not entitled to another judge, where the sentencing judge had not violated the defendant's constitutional rights, and the record did not show that defendant has been treated unfairly.

A judge is not disqualified from sitting in contempt proceedings merely by reason of the fact that the contempt took place before him, or that it was based on imputations

as to such judge's motive or his integrity, 48 C.J.S., Sec. 82, page 1063 C.

"Bias or prejudice of a judge to disqualify him must be an actual bias or character calculated to sway his judgment seriously and generally must be directed against a party to the cause, and must arise other than from the judicial proceedings before him. Only a personal prejudice for or against the party will serve as disqualification." 48 C.J.S., Sec. b., pages 1058-1059.

"To be disqualified, the alleged bias and prejudice of a judge must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed. 2d 788.

Petitioners make much of the candor of the Trial Chancellor in his Memorandum Opinion which stated, ". . . that he had a *friendly relationship* with Bunn F. Fawcett and wife Janice Fawcett and that he does not know any of the Plaintiffs in this case. . . ." (Italics ours) Petitioners' Petition for Writ, A-35.

Now let us examine Petitioners' Petition for Writ, Statement of the Case, page 5, as follows: "The Memorandum Opinion of December 20, 1979, further discloses that the Trial Chancellor had *a close personal friendship with the defendants.*" (Italics ours)

Then again in Petitioners' Petition for a Writ, Argument, page 14, it was stated, ". . . Memorandum Opinion . . . indicated that the Trial Chancellor had *a personal friendship with two of defendants* . . . Bunn F. Fawcett and Janice Fawcett." (Italics ours)

We submit that Petitioners' allegations are incorrect, the same not being in conformity with the proof in this case, and we invite this Honorable Court to a full reading of this Memorandum Opinion, as to the fairness and impartiality of the Trial Chancellor in fulfilling the duties of his office, in this cause.

Certainly a judge is not disqualified from presiding merely because he is more friendly with one of the litigants than the other. *Garrett v. State,* 187 Miss. 441, 193 So. 452; 48 C.J.S., *Judges,* Sec. 82(c), page 1062. Nor merely because of his having set in trial of a defendant on previous occasions, 48 C.J.S., Sec. 82(c), page 1061.

It is well settled that matters of disqualification of the trial judge rest largely in the discretion of the trial judge himself.

"Appellant insisted that the Trial Judge should have disqualified himself because he had formerly been somewhat closely associated with Appellee, both socially and in a business way. We point out that no showing was made which would disqualify the Trial Judge under any Statute or under the Constitution of the State. Such matters of disqualification are, as we have said many times, left largely to the discretion of the trial judge, himself. We cannot say that the Trial Judge abused his discretion in this instance. . . ." *Narisi v. Narisi,* 229 Ark. 1059, 320 S.W. 2d 757 (1959).

Neither the fact that the District Judge may have personally known one defendant who, himself was a judge, nor former's statement that he had the utmost confidence in the latter warranted disqualification of the District Judge

on the ground of bias or prejudice. *Harley v. Oliver*, 400 F. Sup. 105 (1975).

Merely because a trial judge in prior judicial action has found it necessary to cite a party for contempt, does not automatically or inferentially raise issue of bias. *Barry v. Sigler*, C.A. Neb. 373 F.2d 835 (1967).

Petitioners have cited the case of *Farley v. Jester*, 257 Ark. 686, 560 S.W.2d 200 (1975) with reference to the friendship of the Trial Judge with a witness. That case is readily distinguishable from the case at bar in the following particulars:

(1) In that case the trial Court went off the record for some phase of the testimony, and the Arkansas Supreme Court held this was not permissible and reversed and remanded the same.

(2) It was further brought out therein, that the Chancellor had said, that he was closely connected with the witness, Park, and that if he had known that Park was going to be a witness he would have excused himself, and that whatever Park testified to would be the findings of the court. The Chancellor stated that he did not say that, what Mr. Park testified to, would be the verdict of the court, or did not remember saying it. He stated that what Park said would not dictate what the court determined, though it may have outweighed some of the other testimony.

The Arkansas Supreme Court further commented: "Of course, if the court's relationship with a witness is such that he would, with advance knowledge that that person would testify, recuse himself — then — the matter becomes

very simple — he is disqualified, and should so announce when he learns that that person will be a witness."

Petitioners have further cited *Braswell v. Gehl,* 263 Ark. 706, 567 S.W.2d 113, (1978), and will no doubt in their reply brief, again cite to this Court, cases previously mentioned in the Arkansas Court of Appeals, of *Edmonson v. Farris,* 263 Ark. 505, 565 S.W.2d 617 (1978), and *State v. George,* 250 Ark. 968, 470 S.W.2d 93 (1971).

They are cited by Petitioners with reference to Canon 3-C of the Code, of the American Bar Association Code of Judicial Conduct, as stated, being adopted by the Supreme Court of the State of Arkansas, on October 12, 1973, to the effect that a judge should disqualify himself in any proceedings in which his impartiality might reasonably be questioned.

In the *Gehl* case, supra, the trial judge was the father-in-law of the Appellee's attorney.

To the same effect was the *Farris* case, supra, in which the Court gave a warning (although deciding the case on other grounds), that the trial court should disqualify himself upon his own motion, if his son was the lawyer, representing the Appellee.

In the *George* case, the regularly presiding trial judge was disqualified, and selected the judge for exchange, and the Arkansas Supreme Court held that to be a proceeding in which the regular presiding judge was interested, where the disqualification resulted because the proceedings would affect individual rights of the presiding judge.

Certainly these cases are those in which the impartiality of a judge might reasonably be questioned, if he heard

the case as a relative or had an interest in same. None of these facts, are present in the case at bar.

If the Trial Chancellor in the instant case, had been related, or had been interested in some particular in the cause, then of course, the proceedings would appear to be unfair and partial, and he would have been expected to recuse himself, on his own motion. Such however were not the facts in the case at bar.

The Trial Chancellor stated that he could give a fair and impartial trial to all litigants, before his court, and that otherwise, he would not be worthy to be a Chancellor.

In a small district such as his in Southwest Arkansas, certainly he is on friendly terms with a large part of his constitutency, and it is evident that he cannot disqualify himself, everytime a question of this nature arises. Petitioners' Petition for Writ, Appendix A-36.

Neither the law nor the Code of Judicial Conduct requires this. The entitlement is not one of a friendly or unfriendly judge to litigants, but one who can lay aside all interests, and decide without bias or prejudice, under the facts and the law in the cause. The Trial Chancellor said that he could do this, and the Arkansas Court of Appeals found that he did do so.

There was a judicial discretion vested in the Trial Chancellor as to whether or not, he would try the case at bar. The State Appellate Court on appeal decided that he did not abuse that discretion by deciding the case. Petitioners' Petition for Writ, Appendix A-6-7.

Further, on the merits of the case, the Court found that Respondents would prevail under their Color of Title, and

adverse possession of the said alleged life Estate of Mary Rogers Wilson, to an undivided one-half lifetime interest in 160 acres of land in Little River County, Arkansas, and quieted title in Respondents. Petitioners' Petition for Writ, Appendix A-11. The evidence of the violation of the Fifth and the Fourteenth Amendments to the United States Constitution are simply not present in the case at bar.

Certainly the appearance of impropriety to a fair minded litigant or to a truly disinterested outsider, in observing the trial and actions of the Trial Chancellor would not be evident in the trial and record, and manifestations of patience, fairness and impartiality exhibited by the judge would dominate.

It is true that to an interested party, as petitioner, he might not think so, in his advocacy of his particular side of the facts. However we think the test of such appearance of impropriety, should not be measured entirely by the partiality of the parties, but to the impartiality evidenced by the Tribunal, in dealing with the many procedures and questions coming before him. And this could best be evidenced through the eyes and mind of a fair-minded litigant and a disinterested, preferably a previously uninformed person, on the subject matter.

There was no evidence of the badgering of Mr. Tackett by the Trial Chancellor. It was not established that the Trial Chancellor ever made any statement at all with reference to Petitioner, and there was no evidence against the Trial Chancellor of bias or prejudice in recalling Sheriff Thrash, as it was necessary to inquire of the sheriff as to what actions he had taken in the case. Petitioners' Petition for Writ, Appendix A-8.

Petitioners further allege bias and prejudice and appearance of impropriety, in violation of the Fifth and Fourteenth Amendments to the United States Constitution by the Trial Chancellor's failure to consider the opening trial brief, because the same was not filed at 9:00 a.m., January 9, 1980, when due.

The Trial Chancellor gave Petitioner two additional days to file his brief, or on January 9, 1980, and the brief was filed at 9:00 a.m., on January 10, 1980. He had earlier indicated that he would not consider briefs not filed as scheduled.

The Arkansas Court of Appeals found no prejudice or abuse of discretion by the Trial Chancellor in failing to consider the first brief. Petitioners were allowed to file their Reply Brief in accordance with the original schedule and were able to reply point by point to matters raised by Respondents and to include their closing argument in that brief. Petitioners' Petition for Writ, Appendix A-16.

We submit that the Trial Chancellor was fair to both parties, and that there has been no denial of due process of law. The Trial Chancellor had a right to be in control of the Administration of his Court and to make the schedule for the procedure of Argument before the Court. He must be able to enforce the rules for the orderly transaction of the business before the Court.

a. The total time for all parties to file briefs in any case in the Circuit, Chancery and Probate Courts is limited to a period of not to exceed 30 days after trial is completed and the case ready for decision.

(1) The time for filing briefs may be extended, re-

duced or eliminated in any particular case in the discretion of the trial judge.

(2) The time allocated by the trial judge for filing briefs shall be apportioned among the various parties as directed by the trial judge. . . .

Volume 3 A, Arkansas Statutes Annotated (1979 Replacement) Circuit and Chancery Rule 14, Appendix, Rules of Court, page 516.

This matter was within the discretion of the Trial Chancellor to handle and we submit that he did not abuse that discretion.

III

THE TRIAL CHANCELLOR'S DENIAL OF PETITIONERS' MOTION TO FILE AN AMENDED COMPLAINT BASED ON 42 U.S.C. 1985(3) AND HIS DENIAL OF A REQUEST TO CALL WITNESSES IN SUPPORT THEREOF DID NOT CONSTITUTE A DENIAL OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

It is not denied in this case that the testimony was closed and that both sides rested their case on December 21, 1979, subject only to the taking by the Petitioners of the deposition of their witness, Martha Edmonson. (R. 760) The deposition was taken on January 3, 1980. Motion to file the Amended Complaint was made and filed on January 7, 1980. (R. 85-87) This suit asked for $1,000,000.00 damages and was filed under the Civil Rights Act, and asked for a jury trial. Otbie Jetton and Lula Bowles Talton were named as additional party Plaintiffs. It should be noted that under

the agreed stipulation with Petitioners' attorney at the trial of the merits of this cause on December 20, 1979, that the rights of Otbie Jetton and Lula Bowles Talton were concluded by the decision in *Jetton v. Fawcett,* supra.

Nevertheless, Petitioners prevailed on the Trial Chancellor to amend the Complaint on January 8, 1980, but the request was denied. Petitioners had intervened on August 26, 1977, in the original suit which began on July 25, 1975. Respondents filed a counterclaim on a Suit to Quiet Title to lands in the cause. Petitioners sought to introduce testimony of the death of one Cubie Boyd, allegedly by a brother of Respondents in the early 1940's to show a climate of fear among the older black people against Respondents and a conspiracy to prevent Petitioners from assertion of their rights in the subject land and that Respondents were responsible therefor.

Petitioners sought to use as a witness, the widow of the deceased Cubie Boyd to tell of the murder of Cubie Boyd, and did not bother to check the records at the local courthouse to determine the outcome of the case.

Petitioners also seek in their Argument at page 16, Petitioners' Petition for Writ, to infer that Respondents inflicted acts of terrorism on the property and that Otbie Jetton was told by the sheriff not to go back on the subject property. There is no proof that Respondents were guilty of any act of terriorism, and there is convincing proof that since 1950 Respondents have been the exclusive owners and in possession of the said 160 acres of land, and that Petitioners have not ever been in the possession or ownership of the same.

Petitioners also allege therein that Plaintiff Lula

Bowles Talton signed a document which she did not know the contents of under an implied threat of death by the Defendant, R. L. Fawcett. Petitioners know that there was no threat or implied threat of death, ever made to Lula Bowles Talton, and the record does not reflect it.

Further, the document they refer to must have been the Warranty Deed which Respondents went in possession under in 1950, and Lula Bowles Talton had been out of the ownership and possession of the said premises, for over the past 30 years.

Rule 15, Rules of Civil Procedure, Appendix — Rules of Court, Vol. 3 A, page 345, Arkansas Annotated (1979 Replacement), provides: (a) A party may amend his pleadings at any time without leave of the Court. Where, however upon motion of an opposing party, the Court determines that prejudice would result or the disposition of the cause unduly delayed because of the filing of an amendment, the court may strike such amended pleading or grant a continuance of the proceedings. . . . (b) . . . If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the Court may allow the pleadings to be amended in its discretion. At Appendix A-13 and A-14, Petitioners' Petition for Writ, the Arkansas Court of Appeals takes up this issue, stating that the rule allows the amendment of pleadings to conform to the proof, the purpose of the rule is not to allow the insertion of new claims for relief following trial of a cause of action, but to conform to pleadings of proof adduced at trial. Further, that Petitioners were seeking to inject new matters of proof, and in fact, new parties to the action.

Also that it is within the sound discretion of the trial court to allow or refuse amendments to pleadings. *Folk*

Construction Company v. Sun Pipe Line Company, 271 Ark. 836 (Ark. App. 1981). That court found no abuse of discretion in this cause, and therefore it was not necessary to consider whether or not a Civil Rights claim could be raised in Chancery, or that it was an abuse of discretion and a denial of due process to deny Petitioners the right to call witnesses, in support of their motion for leave to file an amended complaint.

Respondents submit, however, that Petitioners could not raise the issue and file a Civil Rights suit for damages, in the Little River County, Arkansas Chancery Court, after all parties had rested their case, and to bring in new issues and new parties and ask for a jury trial, in said Court.

If they desired to file a civil suit for damages, or because of some wrong allegedly done to them, it would be necessary for them to file a suit in the Little River County, Arkansas Circuit Court, since they demanded a jury trial.

Arkansas Statutes Annotated, 1947 (1962 Replacement), Section 22-404, provides that Chancery Courts shall have original jurisdiction of all matters in Equity. Also, that Equity has no jurisdiction where there is a remedy at law. *Home Fire Insurance Co. v. Benton*, 106 Ark. 552, 153 S.W. 830 (1913).

Arkansas Statutes Annotated, Section 22-301, states that Circuit Courts shall have original jurisdiction of all actions and proceedings for the enforcement of civil rights, or redress of civil wrongs, except when exclusive jurisdiction is given to other Courts.

Petitioners in the State Appellate Court, cited *Jordan Bierbaum v. City of Hamburg*, 262 Ark. 532, 559 S.W.2d 20 (1977), as authority for the right to prosecute the instant

action amendment in Equity under the clean-up doctrine. That case is distinguishable from the case at bar in the following instances: (1) The landowner himself filed the suit in Chancery for damages for condemnation. (2) Also the condemning authority, the City, asked the Court to condemn the land and to assess the damages. (3) There was no objection by the landowner to the assessment of damages, and he did not ask for a jury trial.

In the case at bar, damages, are asked for and a jury trial demanded by Petitioners. Respondents also objected to the trial of the issues of the amended complaint in the Chancery Court.

Therefore, Respondents state it was too late on January 7, 1980 for Petitioners to file a Civil Rights Action in the Chancery Court, on an Intervention in a Suit to Quiet Title to land, if, indeed, one could have been filed in the first place. However, it was not too late then, and may not be too late now possibly for them to file such a suit in the Little River County, Arkansas Circuit Court. Of course that is for the Courts to interpret when and if such action be filed. Suffice it to say that no such action would now seem valid, we submit, either under State or Federal law, in the Chancery Court as Petitioners seek to acquire by amendment.

Petitioners state in their Petition for Writ, page 17, third paragraph, that the refusal of the Trial Chancellor to allow them to call witnesses on their amended complaint was a denial of due process, in that it was an act that might forever bar the Civil Rights claims of petitioners without an opportunity to be heard.

Attorneys for Petitioners made offer of proof, as to

what the witnesses would testify to and the Trial Chancellor had the right and duty to exclude the proffered evidence, as being nonrelevant to the case and issues involved, in addition to all of the other objections that were made to the filing of the amended complaint.

As the Trial Chancellor so aptly stated at the time, that he had heard a suit to quiet title to land upon which he was to make his decision, and he could not go back and try a murder case, an alleged murder case, that happened in the 1940's.

It is significant to note that in Petitioners' Petition for Writ, page 6, second paragraph, that they filed a Petition with the Arkansas Supreme Court on February 14, 1980, seeking a permanent injunction to prevent the Trial Chancellor from rendering a decision, and to ask for a transfer of all proceedings to the United States District Court, Western District of Arkansas, Texarkana Division, "*where a companion action had been filed arising out of the same alleged Civil Rights violations.*" (Italics ours)

Thus it is shown that in addition to this State Action on Civil Rights issue before this Court, Petitioners also have a companion action thereon that has been filed in the Western District of Arkansas, Texarkana Division, since before February 14, 1980, so it would appear that they should not fear that their Civil Rights Action might be forever barred or that such witnesses as they desired to call might not have an opportunity to be heard in the Federal Court, as well as in the State Circuit Court as previously mentioned.

Surely when attorneys for Petitioners presented to the Trial Chancellor the substance of what the testimony

would be by the witnesses, and the purposes of the same, he had the right and the duty to exclude the same, if it was not relevant or material to the case and issues at bar.

Thus, if it appeared to Petitioner that the Trial Chancellor was biased or prejudiced against him, because he did not admit into evidence in a Chancery Action to quiet title to property, in 1979, to wit:

Alleged testimony concerning the murder of one not connected with the case, by another, also not a party to the action, which murder occurred in 1941, the same is not a gauge to measure impropriety, bias or prejudice, even though in the eyes of Petitioner, the failure to admit the testimony of an alleged witness to the murder might cause him to believe the judge was prejudiced.

The Court is under a duty to stay within the realm of legal procedure for all parties, and not to go off on tangents wholly unrelated to the subject matter of the trial proceedings.

We submit, therefore, that in any event, under the facts and law in this cause, the Trial Chancellor did not abuse his discretion in refusing to allow the amendment to the Complaint of the Petitioners, nor in failure to allow the testimony, of the Petitioners' witnesses thereto.

The Trial Court had the right and the duty to conclude this case after both parties had rested, and to refuse to allow irrelevant and immaterial testimony in the cause which was offered by Petitioners, too late and in the wrong tribunal, and on behalf of parties and issues, which have long since been excluded by Courts of competent jurisdiction in this cause.

CONCLUSION

Respondents submit that all of the Reasons for granting the Writ of Certiorari to the Arkansas Court of Appeals as set out in the Petition for Writ by Petitioners are questions in which the discretion of the Trial Chancellor were involved and that such discretion exercised by the Trial Chancellor was fair and proper, the order of the Arkansas Court of Appeals on review, so finding.

Therefore, since there does not appear to be any bias, prejudice, or discrimination, nor a Federal Question involving the violation of the Fifth or the Fourteenth Amendments to the Constitution of the United States, in this cause, it is further submitted that there is nothing which would call for a review by this Honorable Court of the issues involved, which have not already been validly decided by the Arkansas State Court on Appeal.

Wherefore, Respondents pray that the Writ of Certiorari be, by this Honorable Court, denied to Petitioners, and all relief, entitled herein.

Dated: July 22, 1981.

Respectfully submitted,

JOHN C. FINLEY, JR.
Counsel of Record
JOHN C. FINLEY III

FINLEY & FINLEY
Attorneys at Law
20 E. Main St.
Ashdown, Arkansas 71822
Telephone (501) 898-3147

Attorneys for Respondents